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ORGANIZED PROFESSIONAL TEAM SPORTS AND THE ANTITRUST LAWS

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To what extent, if any, should organized professional team sports[1] be exempt from the federal antitrust laws? This problem has received substantial consideration by the judiciary and Congress, but to date remains unresolved. An analysis of this perplexing question together with a proposed solution is the task undertaken in this paper.

I. History of the Problem

The *Federal Baseball* case,[2] decided by the Supreme Court in 1922, is the genesis of any discussion concerning the application of antitrust laws to organized professional team sports. In that case it was unanimously held[3] that orgamized professional baseball was not interstate commerce, and therefore was not subject to the federal antitrust laws. Mr. Justice Holmes, in writing the opinion of the Court, pointed out that baseball was neither "interstate" nor "commerce." He took the position that "exhibitions of baseball"[4] were "purely state affairs"[5] with only incidental effects on interstate commerce, and that as baseball involved "personal effort, not related to production,"[6] it was "not a subject of commerce."[7]

After the *Federal Baseball* case, significant changes took place in the business of baseball[8] as well as in the Supreme Court's conception of

† See Contributors' Section, Masthead, p. 659, for biographical data.

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1 The term "organized professional team sports" as used in this article refers to organized professional baseball, football, hockey and basketball.

2 Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs, 259 U.S. 200 (1922).

3 The Federal Baseball case was the only Supreme Court decision dealing with the antitrust aspects of professional sports to be unanimous. Cf. Radovich v. National Football League, 352 U.S. 445 (1957); United States v. International Boxing Club of New York, Inc., 348 U.S. 236 (1955); Toolson v. New York Yankees, Inc., 346 U.S. 356 (1953).

4 259 U.S. at 208.

5 Ibid.

6 Id. at 209.

7 Ibid.

8 Many have the erroneous impression that the Supreme Court in the Federal Baseball case held that baseball was a sport and not a business. Professional baseball has always been considered a business. See 259 U.S. at 208.

"interstate commerce." With respect to changed business conditions, two are particularly noteworthy. First, the "farm system"[9] was developed, whereby major league clubs gained ownership or substantial control over many minor league teams throughout the country. Second, radio, and later television, began to broadcast games to every corner of the nation.

Simultaneously with these changes in baseball, the Supreme Court, in a host of decisions,[10] continued to broaden the constitutional concept of "interstate commerce." One of these—*United States v. South-Eastern Underwriters Association*[11]—is of special interest since it, in effect,[12] overruled *Paul v. Virginia*[13] and *Hooper v. California*,[14] the cases upon which the Supreme Court relied in deciding the *Federal Baseball* case.[15] A brief discussion of the *Paul* and *Hooper* cases and of their relationship to the *Federal Baseball* decision will highlight the significance of *South-Eastern Underwriters*.

Paul and *Hooper* each involved the question of whether a company conducting an insurance business in several states was engaged in inter-

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[9] "When baseball clubs in leagues of lower classification are owned or controlled by a baseball club of higher classification, normally a major league, they comprise a farm system or chain."

"Control may be in the form of stock ownership, either in whole or in part, of the club of lower classification, sufficient to enable the club of a higher classification to pick and choose, subject to the major and minor league rules, all or some of the players on the roster of the club of lower classification. Control, without outright ownership, may be exercised through working agreements. . . ." H.R. Rep. No. 2002, 82d Cong., 2d Sess. 177 (1952).

[10] Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219 (1948); Martino v. Michigan Window Cleaning Co., 327 U.S. 173 (1946); Roland Electric Co. v. Walling, 326 U.S. 657 (1946); Wickard v. Filburn, 317 U.S. 111 (1942). See also Dowling, "Constitutional Development in Five War Years," 32 Va. L. Rev. 461, 467-75 (1946); Neville, "Baseball and the Antitrust Laws," 16 Fordham L. Rev. 208, 216-30 (1947); Comment, 62 Yale L.J. 576, 608-11 (1953); and Notes, 53 Colum. L. Rev. 242, 247-48 (1953); 5 N.Y.U. Intra. L. Rev. 206, 211-16 (1950); 24 Notre Dame Law. 372, 375-77 (1949). For an interesting analysis of the term "trade or commerce" see Hamilton and Adair, The Power to Govern 49-63 (1937).

[11] 322 U.S. 533 (1944).

[12] The Court in the Underwriters case did not specifically state that it overruled Paul v. Virginia, but that this was the effect of the decision there can be no doubt. Mr. Justice Jackson recognized this in his partial dissent. In 322 U.S. at 587 he said, "Instead of overruling our repeated decisions that insurance is not commerce . . ."; and at 589 he stated, "But the Court now is not following, it is overruling, an unequivocal line of authority reaching over many years."

[13] 74 U.S. (8 Wall.) 168 (1868).

[14] 155 U.S. 648 (1895).

[15] In its opinion, the Supreme Court cited Hooper v. California and failed to cite Paul v. Virginia. However, there can be no question that the Court also relied on the Paul case. In the first place, the Supreme Court virtually adopted the rationale of the court of appeals. It considered that the appellate court had gone "to the root of the case," 259 U.S. at 208, and since that lower court relied on Paul v. Virginia, 269 Fed. 681, 685 (D.C. Cir. 1921) it can be assumed that the Supreme Court did too. Secondly, the Court used language in its opinion, namely, "Personal effort, not related to production is not a subject of commerce," which was taken verbatim from the defendants' brief. As the defendants cited the Paul case in support of this statement, it gives further indication that the Supreme Court relied on that case. Finally, the rationale of the Hooper case is based so completely on the Paul case that to depend on Hooper required the Court to rely on the Paul case. See Rep. Att'y Gen. Comm. to Study Antitrust Laws 63 (1955).

state commerce. The court held in each case that it was not, on the ground that issuing a policy of insurance was not a transaction of commerce.[16] The fact that an insurance business utilized some of the instrumentalities of interstate commerce in effecting a policy did not transform that business into interstate commerce.[17] The use of such interstate commercial arteries was considered purely incidental to the issuance of an insurance policy. Thus, according to these cases, the business of insurance was not commerce, but a local activity with incidental effects on the flow of interstate commerce.

The Holmes opinion in the *Federal Baseball* case adopted analogous reasoning. The business of baseball was considered not to be commerce, but a local activity. The transportation in interstate commerce of players, and the paraphernalia used by them, was viewed as incidental to the primary purpose, namely, the production of a ball game, and was "not enough to change the character of the business."[18] Said Mr. Justice Holmes, "[T]he transport is a mere incident, not the essential thing. . . . That which in its consummation is not commerce does not become commerce among the States because the transportation that we have mentioned takes place."[19] Consequently, as in the insurance cases, the business of baseball was held not to be commerce, though some of its incidents were.

In *South-Eastern Underwriters* members of an association of insurance companies were indicted for alleged violation of sections 1 and 2 of the

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[16] The Supreme Court in Hooper v. California relied on the same language used in Paul v. Virginia. In the Hooper case, 155 U.S. at 654, the Court stated:

> Thus in Paul v. Virginia, the court, speaking through Mr. Justice Field, said: "Issuing a policy of insurance is not a transaction of commerce. The policies are simple contracts of indemnity against loss by fire, entered into between the corporations and the assured. . . . These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter, offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one State to another, and then put up for sale. They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration. Such contracts are not interstate transactions, though the parties may be domiciled in different States. The policies do not take effect—are not executed contracts—until delivered by the agent in Virginia. They are, then, local transactions, and are governed by the local law."

[17] The Court in Hooper v. California, 155 U.S. at 655 when faced with the argument that an insurance corporation in effecting a policy used some of the instrumentalities of interstate commerce and therefore was engaged in such commerce, said:

> It ignores the real distinction upon which the general rule and its exceptions are based, and which consists in the difference between interstate commerce or an instrumentality thereof on the one side and the mere incidents which may attend the carrying on of such commerce on the other. . . .
>
> The business of insurance is not commerce. The contract of insurance is not an instrumentality of commerce. The making of such a contract is a mere incident of commercial intercourse. . . .

Cf. National League v. Federal Baseball Club, 269 Fed. 681, 685 (D.C. Cir. 1921), aff'd 259 U.S. 200 (1922).

[18] 259 U.S. at 209.

[19] Ibid.

Sherman Act. The defendants contended that as insurance was not commerce the Act failed to apply to their operations. In reversing an unbroken line of cases which extended over a period of 75 years,[20] the Supreme Court held the insurance business *was* interstate commerce and thus subject to the antitrust laws. The decision completely destroyed the rationale relied on in the *Paul* and *Hooper* cases. The Court conceded that contracts of insurance were local in nature, but contended that interstate activities were essential to their negotiation and execution. As a consequence, there was a chain of inseparable events constituting interstate commerce.[21] In the light of this decision, additional doubt[22] was raised as to the current validity of the *Federal Baseball* ruling since it had leaned so heavily on the earlier insurance cases.[23]

Against this background, a player named Daniel Gardella brought a treble damage action against organized baseball in 1948. The *Gardella* suit[24] was the first since the *Federal Baseball* case in which organized professional baseball was accused of violating the antitrust laws. It was soon followed by *Martin v. National League*[25] and several other private antitrust suits, including the well known *Toolson* case.[26]

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[20] These cases commenced with Paul v. Virginia in 1868 and ended with United States v. South-Eastern Underwriters Association in 1944.

[21] This approach differed from that used by the Supreme Court in earlier insurance cases wherein the Court purported to separate and weigh the interstate and local aspects of an enterprise in order to distinguish the essential from the incidental.

[22] The term "additional doubt" is used because other Supreme Court decisions (see note 10 supra) as well as changes in baseball's business practices had also made it questionable whether the Federal Baseball case was still sound.

[23] See Neville, supra note 10 (contended that Federal Baseball Club v. National League had in effect been overruled). Cf. Eckler, "Baseball-Sport or Commerce?," 17 U. Chi. L. Rev. 56 (1949) (argued that baseball was not commerce). Note how Professor Powell discussed the impact of the South-Eastern Underwriters case on the Federal Baseball decision in "Insurance as Commerce in Constitution and Statute," 57 Harv. L. Rev. 937, 960-61 (1944).

[24] Gardella v. Chandler, 172 F.2d 402 (2d Cir. 1949), reversing, 79 F. Supp. 260 (S.D.N.Y. 1948).

[25] 174 F.2d 917 (2d Cir. 1949), affirming, Martin v. Chandler, 85 F. Supp. 131 (S.D.N.Y. 1949).

[26] Prendergast v. Syracuse Baseball Club, Inc., No. 3936, N.D.N.Y. April 30, 1951. This suit involved a pitcher who was blacklisted because he refused to be assigned by Syracuse to Beaumont at a substantial salary cut. The case was dismissed after the Supreme Court decided Toolson v. New York Yankees, Inc., 346 U.S. 356 (1953). For a detailed discussion of the facts surrounding the Prendergast case see Hearings on Organized Professional Team Sports before the Antitrust Subcommittee of the House Committee on the Judiciary. 85th Cong., 1st Sess., ser. 8, pt. 1, at 1202-33 (1957).

Tepler v. Frick, 112 F. Supp. 245 (S.D.N.Y. 1952), aff'd, 204 F.2d 506 (1953). In this case the plaintiff alleged that he injured his arm pitching for Nashville; and contended that the defendants, through the regulations of organized baseball, had in effect reduced him to a state of peonage, and were negligent in their care of him. The complaint was dismissed on the ground that there was no allegation of damage to the plaintiff resulting proximately from the acts of the defendants which constituted violation of the antitrust laws.

Other cases, the facts of which will be discussed infra, include: Corbett and El Paso Baseball Club, Inc. v. Chandler, 346 U.S. 356 (1953), affirming, 202 F.2d 428 (6th Cir. 1953); Kowalski v. Chandler, 346 U.S. 356 (1953), affirming, 202 F.2d 413 (6th Cir. 1953); Toolson v. New York Yankees, Inc., 346 U.S. 356 (1953), affirming, 200 F.2d 198 (9th Cir. 1952).

Gardella v. Chandler arose out of the fight for players' services which organized professional baseball was having with the Mexican League immediately after World War II.[27] In an effort to halt the exodus of players from the major leagues, Commissioner A. B. Chandler announced that any player who "jumped" his contract or his reserve clause would be blacklisted for five years.[28] Despite the admonition, 18 players, including Gardella, left major league clubs to play in Mexico.[29]

Danny Gardella played with the New York Giants in 1944 and 1945, but did not sign a contract with that team for the 1946 season. Instead Gardella signed with the Mexican League thereby "jumping" the reserve clause of his contract with the Giants. In line with his warning, Commissioner Chandler blacklisted Gardella and the other players who "jumped" to Mexico. When Gardella found playing conditions south of the border not to his liking, he applied to Chandler for reinstatement, but the Commissioner denied the application.[30] Thereafter, Gardella brought suit, alleging organized baseball was a monopoly and conspiracy in restraint of trade in violation of the Sherman and Clayton Acts.[31]

On the authority of *Federal Baseball,* the district court dismissed the case for lack of jurisdiction.[32] On appeal, by a split decision and in three separate opinions, the Court of Appeals for the Second Circuit reversed and remanded the case for trial. Judge Learned Hand joined Judge Frank in voting for reversal while Judge Chase registered a dissent.

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[27] The postwar period . . . brought the first challenge since the Federal League of 1914-15 to organized baseball's monopsony position in the market for baseball players. In 1946, Don Jorge Pasquel, millionaire president of the Mexican League, an association not affiliated with organized baseball, sought to employ players from the major leagues and touched off what is known as "the Mexican League war."
H.R. Rep. 2002, 82d Cong., 2d Sess. 77 (1952) (hereinafter cited as House Report).

[28] Id. at 77-78. All major league player contracts are identical in form. This is provided for by Major League Rule 3(a). These contracts provide for the employment of a player for one year. However, they also contain a renewal clause wherein the club is given the right to renew the contract on the same terms for the following year, provided only that the player's salary may not be reduced by more than 25 per cent. Since the club's right to renew the contract on the same terms is itself one of the terms of the contract, the renewal clause obviously gives the club a perpetual option on the player's services. The clause is commonly referred to as the "reserve clause." It will be discussed in substantial detail infra under "II. Organization and Practices of Professional Team Sports."
There is a difference between "jumping" a reserve clause and "jumping" a contract. In the former case it means that the player played with a team outside organized baseball without signing a uniform player's contract for the season in question. The latter case occurs when a player signs a uniform player's contract for the season involved and subsequent thereto plays with a team outside organized baseball. The difference between the two situations is factually illustrated by the Gardella and Martin cases. Gardella did not sign a contract before playing with the Mexican League. See House Report 78-79.

[29] House Report 77.

[30] Id. at 79.

[31] 26 Stat. 209 (1890), 15 U.S.C. §§ 1-3 (1952); 38 Stat. 731 (1914), 15 U.S.C. §§ 13-(1952).

[32] Gardella v. Chandler, 79 F. Supp. 260 (S.D.N.Y. 1948), reversed, 172 F.2d 402 (. Cir. 1949). Notice how reluctant Judge Goddard was to grant the defendant's motion to dismiss.

The case on appeal raised two fundamental questions that were considered in each of the opinions. One was whether organized professional baseball was engaged in interstate commerce. The other was, assuming baseball to be so engaged, whether the antitrust laws applied to the reserve clause.

Judge Hand's response to the first issue was quite interesting. He took the position that the connections baseball had with radio and television, gave it "interstate features" which were not present when the Supreme Court decided *Federal Baseball Club v. National League.*[33] The Judge was quick to point out, however, that although baseball's relationship with broadcasting meant that it was "pro tonto engaged in interstate commerce,"[34] it did not automatically follow that such features of its business subjected baseball *as a whole* to the antitrust laws. He stated that, assuming the case went back for trial, it would become necessary for the plaintiff to prove that all of baseball's interstate activities, including radio and television, when taken together, would be large enough to impress upon that business an interstate character.[35]

Judge Frank likewise found that organized baseball was engaged in interstate commerce. He made it clear that he did not feel bound by the *Federal Baseball* case since, in his opinion, the Supreme Court had in effect overruled that decision, and had left it but "an impotent zombie."[36] The Judge went on, in any event, to distinguish that earlier case on the basis of the advent of radio and television. He did not, however, agree with Judge Hand's conclusion that there was need for the plaintiff to prove that the defendants' interstate activities represented a substantial portion of their total activities. Judge Frank was satisfied that the broadcasting features alone were sufficient to bring baseball under the antitrust laws.

Judge Chase in his dissent contended that baseball was not interstate commerce. He expressly relied on the *Federal Baseball* case. Moreover, he stated that even in 1922 telegraphic reports of baseball games were transmitted across state lines. He felt that the difference between such transmissions and present-day broadcasting was a difference of no legal significance.

The second major issue in the case—the applicability of the antitrust laws to the reserve clause—can best be discussed by considering the dis-

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[33] 172 F.2d at 407-08.

[34] Id. at 408.

[35] Therefore, Judge Hand insisted on using the same "incidental-essential" formula that was employed by Mr. Justice Holmes in Federal Baseball. Compare the approach taken by the Supreme Court in United States v. South-Eastern Underwriters discussed supra.

[36] 172 F.2d at 409. The ghost still walks, however. See Radovich v. National Football League, 352 U.S. 445 (1957).

sent first, since the views expressed by Judges Hand and Frank on this point were, in a sense, an answer to an argument made by Judge Chase.[37] It was contended by Judge Chase that as the reserve clause was a device used by baseball owners to control and regulate the labor of human beings, any controversies with respect to it were problems of labor-management relations, not of the antitrust laws. He maintained that the Supreme Court had never applied the Sherman Act unless it was of the opinion that there was some form of restraint upon commercial competition in the marketing of goods and services in interstate commerce. He stated that the instant case did not involve such a situation, but instead concerned the alleged deprivation of the plaintiff's opportunity to play baseball as a means of earning a livelihood. Judge Chase vehemently argued that the plaintiff's services, or ability to work, were not subjects of trade or commerce within the antitrust laws, and that Congress in the enactment of these laws never intended to cover restraints upon employment.[38]

To this, Judge Hand crisply replied.

> Be that as it may, whatever other conduct the Acts may forbid, they certainly forbid all restraints of trade which were unlawful at common-law, and one of the oldest and best established of these is a contract which unreasonably forbids any one to practice his calling.

Judge Frank expressed the view that although playing baseball involved personal services, he was satisfied, in light of recent Supreme Court decisions, that such services should be regarded as "trade or commerce" as those words are used in the Sherman Act.

One final observation is made about the *Gardella* case. It concerns Judge Frank's opinion. Judge Frank, unlike his colleagues, did not limit his views to questions of jurisdiction, but discussed the merits of the case. He sharply criticized the reserve clause.[41] Naturally these re-

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(37) In the Gardella case, the opinions were written in a rather unique order. Judge Chase's opinion explained the facts of the case, then dissented. The majority opinions of Judges Hand and Frank followed that of Judge Chase. Judge Hand made it very clear that he was answering an argument raised by Judge Chase; for he stated in 172 F.2d at 408:

> As I understand my brother Chase, he thinks that even though the defendants' business be in general subject to the Antitrust Acts, the "reserve clause" is not in violation of them.

38 Id. at 405-06. A N.Y. Supreme Court opinion took the view that even if a monopoly, organized baseball is not illegal under the N.Y. State antitrust law or at common law. American League Baseball Club of New York, Inc. v. Pasquel, 187 Misc. 230, 234, 63 N.Y.S.2d 537, 540 (N.Y. Sup. Ct. 1946).

(39) 172 F.2d at 408.

(40) Id. at 412.

(41) For instance, Judge Frank stated that the reserve clause resulted "in something resembling peonage of the baseball player" (id. at 409), and argued that "if players be regarded as quasi-peons, it is of no moment that they are well paid; only the totalitarian-minded will believe that high pay excuses virtual slavery" (id. at 410). To the defendants' argument that baseball would no longer be able to supply millions of Americans with enjoyment if the reserve clause should be declared illegal, Judge Frank curtly replied, "no

marks must be considered as dicta, but they may significantly influence future decisions of courts called upon to rule on the reserve clause.[42]

The defendants' motion to dismiss in *Martin v. National League*,[43] the other treble damage action involving players who had "jumped" to the Mexican League, likewise failed to impress the Court of Appeals for the Second Circuit; and that case also was remanded for trial. However, both the *Gardella* and *Martin* cases were settled before they reached trial.[44] Notwithstanding settlement of these two cases, an imposing array of litigation against organized professional baseball remained.[45] At this point, moreover, the appellate decisions in the second circuit seemed to forecast a very gloomy future indeed for the defendants in the pending treble damage suits.

The threat posed to organized baseball by the litigation instituted in the late '40's and early '50's prompted "friends of baseball"[46] in Congress to introduce bills designed to exempt completely baseball and other professional sports from the antitrust laws.[47] These bills formed the basis of the congressional hearings on organized baseball held in 1951.[48] After holding these hearings, the House Subcommittee on Study of Monopoly Power recommended that no legislative action be taken.[49] The subcommittee took the position that legislation was not necessary until the reserve clause and other practices of organized baseball questioned by the impending litigation were ruled on by the courts.[50] Congress adhered to the recommendation of the subcommittee, and the bills introduced in the Eighty-second Congress were never enacted. In sum, Congress

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court should strive ingeniously to legalize a private (even if benevolent) dictatorship" (id. at 415).

[42] The reserve clause and the methods used to enforce it are common to all organized professional team sports. Therefore, the significance of Judge Frank's remarks cannot be limited to the reserve clause in professional baseball.

[43] See note 25 supra.

[44] House Report 84. See also Note, 5 N.Y.U. Intra. L. Rev. 206 (1950).

[45] See note 26 supra.

[46] House Report 1.

[47] There were four bills introduced, three in the House and one in the Senate. H.R. 4229, H.R. 4230, H.R. 4231, all introduced in the 1st session of the 82d Congress (1951), were identical. They provided:

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the Act of July 2, 1890, as amended, known as the Sherman Act; the Act of October 15, 1914, as amended, known as the Clayton Act; the Federal Trade Commission Act, as amended; and the Act of June 19, 1936, known as the Robinson-Patman Antidiscrimination Act shall not apply to organized professional sports enterprises or to acts in the conduct of such enterprises.

The Senate bill, introduced in the same session of Congress, was the same as the three House bills except it did not mention the Robinson-Patman Act. See S. 1526, 82d Cong., 1st Sess. (1951).

[48] Hearings before Subcommittee on Study of Monopoly Power of the House Committee on the Judiciary, 82d Cong., 1st Sess., ser. 1, pt. 6 (1951). Hereafter cited as Baseball Hearings.

[49] House Report 232.

[50] Id. at 231.

passed back to the judiciary the problem of the extent to which professional sports should be exempt from the antitrust laws.

In 1953, approximately a year after Congress had decided to take no action, *Toolson v. New York Yankees*,[51] along with *Kowalski v. Chandler*[52] and *Corbett v. Commissioner of Baseball*,[53] were simultaneously considered by the Supreme Court. It was the first time since the *Federal Baseball* case that the question of the application of the antitrust laws to professional sports had come before the Supreme Court. The Court in affirming the sixth and ninth circuit courts of appeals dismissed each complaint for lack of jurisdiction.

In a concise *per curiam* opinion the Supreme Court laid any blame for their action at the doorstep of Congress. After pointing out that *Federal Baseball Club v. National League* had exempted baseball from the scope of the federal antitrust laws, the opinion went on to say:[54]

> Congress has had the ruling [the *Federal Baseball* decision] under consideration but has not seen fit to bring such business under these laws by legislation having prospective effect. The business has thus been left for thirty years to develop, on the understanding that it was not subject to existing antitrust legislation. The present cases ask us to overrule the prior decision and, with restrospective effect, hold the legislation applicable. We think that if there are evils in this field which now warrant application to it of the antitrust laws it should be by legislation.

Within a few days after the Supreme Court rendered the *Toolson* decision, the United States District Court for the Eastern District of Pennsylvania decided *United States v. National Football League*,[55] the only antitrust case the Department of Justice has ever brought against a pro-

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[51] 346 U.S. 356 (1953). Toolson was blacklisted for refusing to accept assignment from Newark to Binghamton. He brought suit alleging defendants had combined to monopolize baseball, and by blacklisting him, they prevented him from earning a living. The defendants' motion for dismissal was granted in the district court, 101 F. Supp. 93 (S.D. Cal. 1951) aff'd, 200 F.2d 198 (9th Cir. 1952).

[52] 346 U.S. 356 (1953). Kowalski was a minor league player who contended that the defendants, through their monopolization of baseball, used draft restrictions and the reserve clause to deprive him of the reasonable value of his services and to prevent his promotion. The trial history paralleled that of the Toolson case. The district court dismissed for lack of jurisdiction, No. 2646, S.D. Ohio, Jan. 25, 1952, aff'd, 202 F.2d 413 (6th Cir. 1953).

[53] 346 U.S. 356 (1953). Corbett owned the El Paso Baseball Club in the Arizona-Texas League. He contracted for the 1949 services of several players who had played in the Mexican League in 1948. As organized baseball in the United States at that time had a reciprocal arrangement with the Mexican League whereby each agreed to respect the reservation claims of the other, the President of the National Association (top administrative official of the minor leagues) awarded the players in question to the Mexican League. Corbett sued alleging that the defendants' monopolization of baseball was based on the reserve clause which had prevented the plaintiff from obtaining the services of the baseball players in question and deprived him of the opportunity to sell their contracts. Just as in Toolson and Kowalski, the district court dismissed on jurisdictional grounds, No. 255 S.D. Ohio, Jan. 25, 1952, aff'd, 202 F.2d 428 (6th Cir. 1953).

[54] 346 U.S. at 357.

[55] 116 F. Supp. 319 (E.D. Pa. 1953). This case was decided on Nov. 12, 1953 and the Supreme Court decided the Toolson case on Nov. 9, 1953.

fessional team sport.[56] The suit, however, was not a direct frontal attack on the business of professional football, but a collateral one, involving the by-laws of the National Football League with respect to radio and television broadcasting.

Article X of the by-laws of the National Football League provided that no club could allow a game in which it was engaged to be broadcasted by radio or television within 75 miles of another League city on the day that the home club of the other city was either playing at home or was playing away from home and broadcasting its game into its home city. An exception to the rule was provided where the outside club obtained permission for such broadcast from the home club. As most League games were played on Sundays, and since the teams, when not playing at home, usually broadcasted their "away games" into their home territories, the restrictions of Article X effectively prevented broadcasts of practically all outside games in all the home territories. The government sought to enjoin the enforcement of the provisions of Article X, contending they were illegal under section 1 of the Sherman Act. The court granted the government a modified injunction.

Judge Grim's opinion was most interesting indeed. He disposed of the defendant's jurisdictional arguments on the ground that as radio and television were clearly interstate commerce, it was immaterial whether professional football was or not. With respect to the merits, Judge Grim was guided by the "rule of reason" rather than by the principle, urged upon him by government counsel, that the allocation of territories or markets was illegal per se.[57]

Judge Grim recognized football as a unique business. He pointed out that the members of a professional league could not afford to compete too well against each other "in a business way"; for if they did, "the stronger teams would be likely to drive the weaker ones into financial failure," ultimately destroying the entire league since there would not be a sufficient number of teams to operate the league profitably.[58] He went on to decide that it was reasonable for a league to prohibit telecasts of a team's games into the home territory of another team while the latter

[56] Only two other antitrust cases have ever been filed by the Department of Justice against professional sports: United States v. National Wrestling Alliance, Civil Action No. 3-729 (S.D. Iowa 1956); United States v. International Boxing Club of New York, Inc., 348 U.S. 236 (1955). The wrestling case was terminated by a contemporaneous consent decree. The boxing case will be discussed infra.

[57] In 116 F. Supp. at 322 Judge Grim stated:

> An allocation of marketing territories for the purpose of restricting competition, however, is not always illegal. There is no simple formula "to displace the rule of reason by which breaches of the Sherman Law are determined. Nor is 'division of territory' so self-operating a category of Sherman Law violations as to dispense with analysis of the practical consequences of what on paper is a geographic division of territory."

[58] Id. at 323.

was playing there. The theory for allowing this restriction was that such telecasts would adversely affect gate receipts and require home teams to suffer serious financial loss.[59]

On the other hand, he held that the provisions of Article X which prohibited telecasts into a team's home territory while that team was not playing there were unreasonable because such telecasts would not have any substantial effect on gate receipts. For the same reason he struck down all prohibitions on radio broadcasting.[60]

In 1955 the problem of the application of the antitrust laws to professional sports once again faced the Supreme Court. This time it did not concern a team sport, but an individual sport, namely, boxing. The Department of Justice had brought a civil antitrust action against the International Boxing Club and several others[61] alleging the defendants in violation of sections 1 and 2 of the Sherman Act, had restrained and monopolized trade and commerce through a conspiracy to exclude competition in the boxing business. The defendants, in the light of the *Toolson* decision, had moved successfully for dismissal in the district court,[62] and on appeal[63] urged the Supreme Court to extend to them the protective umbrella of the *Federal Baseball* and *Toolson* rulings.

The Supreme Court, in reversing the lower tribunal, held that "the promotion of professional championship boxing contests on a multi-state basis, coupled with the sale of rights to televise, broadcast, and film the contests for interstate transmission" constituted interstate "trade or commerce" within the meaning of the Sherman Act.[64] Moreover, in the course of its opinion, the Supreme Court made it clear that other individual professional sports could not rely on the *Federal Baseball* case and the *Toolson* case for exemption from the antitrust laws.[65]

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[59] Id. at 325 the court said:

> The greatest part of the defendant clubs' income is derived from the sale of tickets to games. Reasonable protection of home game attendance is essential to the very existence of the individual clubs, without which there can be no League and no professional football as we know it today.

[60] It is interesting to note that the Department of Justice did not appeal this case. Perhaps the Department feared that such an appeal might result in the Supreme Court modifying or changing the doctrine that conspiracies or combinations to divide or allocate territories or markets are per se illegal.

[61] United States v. International Boxing Club of New York, Inc., 348 U.S. 236 (1955)

[62] See id. at 237-38, and 238 n.3.

[63] In civil actions under the Sherman Act where the United States is the plaintiff, appeal must be taken directly to the Supreme Court. 32 Stat. 823 (1903), 15 U.S.C. § 29 (1952)

[64] 348 U.S. at 240. Thus the case was remanded to the district court where the defendants were held to have violated §§ 1 and 2 of the Sherman Act. See United States v. International Boxing Club of New York, Inc., 150 F. Supp. 397 (S.D.N.Y. 1957)

[65] 348 U.S. at 241-42. The defendants argued that Federal Baseball and Toolson immunized businesses which involved "exhibitions of an athletic nature." The Court retorted that those cases were not "authority for exempting other businesses merely because of the circumstance that they are also based on the performance of local exhibitions." As "local exhibition" is the only thing individual professional sports have in common with the business of baseball, as that business was interpreted by the Federal Baseball case, it is clear

Although a federal district court has held that professional basketball was subject to the antitrust laws,[66] the Supreme Court did not rule upon the question of whether professional team sports other than baseball were subject to the antitrust laws until it reviewed *Radovich v. National Football League* in 1957.[67] The *Radovich* case was a by-product of the "war" between the National Football League and the All-America Conference which took place in the late '40's.[68] Radovich played with the Detroit Lions, a National League club, in 1945. He requested the Lions in 1946 to transfer him to a National League club in Los Angeles because of his father's illness. When the Detroit team refused, he sigued with the Los Angeles Dons, a member of the rival All-America Conference, and played with them for two seasons. Then, in 1948, Radovich was offered employment as a player-coach with the San Francisco Clippers, a member of the Pacific Coast League which was affiliated with the National Football League. According to Radovich, he was prevented from taking this job because the National League advised the Clippers that he had been blacklisted, and if any club hired him, it would be severely penalized.[69] On that basis he brought suit against the National League,[70] and the defendant's motion to dismiss eventually came before the Supreme Court for decision.

In reversing the Court of Appeals for the Ninth Circuit,[71] and remanding the case for trial, the Supreme Court held that professional football did not gain jurisdictional immunity by way of the *Federal Baseball* and *Toolson* cases. The Court espoused a very narrow application of the rule of stare decisis, and, in effect, said that those decisions were limited solely to organized professional baseball.[72] As the or-

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that neither that decision nor the Toolson ruling can be relied on by any individual professional sport for exemption from the antitrust laws. The same rationale, however, would not apply to professional team sports since they have always had many things in common with baseball, such as the reserve clause, the need for competitors to act jointly, etc. See discussion infra under "II. Organization and Practices of Professional Team Sports."

[66] Washington Professional Basketball Corp. v. National Basketball Ass'n, 147 F. Supp. 154 (S.D.N.Y. 1956).

[67] 352 U.S. 445 (1957). See Note, 57 Colum. L. Rev. 725 (1957).

[68] 352 U.S. at 448-49. "The Conference operated from 1946 through 1949 at which time it was disbanded." Id. at 448 n.4.

[69] The alleged facts in the Radovich case are strikingly similar to those in the Gardella case. See p. 570 supra.

[70] Suit was brought under § 4 of the Clayton Act, 38 Stat. 731 (1914), 15 U.S.C. § 15 (1952) alleging the defendants had violated §§ 1 and 2 of the Sherman Act, 26 Stat. 209 (1890), 15 U.S.C. §§ 1, 2 (1952).

[71] Radovich v. National Football League, 231 F.2d 620 (9th Cir. 1956), rev'd, 352 U.S. 445 (1957). The Ninth Circuit Court of Appeals in the Toolson case (note 51 supra) had held that baseball was exempted from the antitrust laws, and was affirmed by the Supreme Court. Here, the Ninth Circuit took the view that Federal Baseball and Toolson applied to all "team sports," and therefore, football was immune from the antitrust laws. See 352 U.S. at 447.

[72] Justices Harlan and Brennan in their dissent pointed out that they were unable to distinguish football from baseball under the rationale of Federal Baseball and Toolson, and

ganization and methods of operation of professional football were so akin to those of professional baseball, the Court realized that its ruling might be considered "unrealistic, inconsistent, or illogical,"[73] but contended that any error or discrimination resulting from the Court's strict interpretation of the *Federal Baseball* and *Toolson* cases should be eliminated by legislation and not by court decision. The Court, speaking through Mr. Justice Clark, put it this way:[74]

> Congressional processes are more accommodative, affording the whole industry hearings and an opportunity to assist in the formulation of new legislation. The resulting product is therefore more likely to protect the industry and the public alike. The whole scope of congressional action would be known long in advance and effective dates for the legislation could be set in the future without the injustices of retroactivity and surprise which might follow court action.[75]

In essence, the Supreme Court requested Congress to handle the problem of the extent to which professional team sports should be exempt from antitrust laws. In response to the Supreme Court, seven bills were introduced in Congress.[76] They fell into three general categories. One bill provided for the complete exemption of professional team sports from the antitrust laws.[77] Two others placed organized professional baseball under the antitrust laws which, in the light of the Supreme Court decisions, meant that all professional sports would be covered if either of these bills should be enacted.[78] The remaining four followed a middle-of-the-road approach.[79] These bills, if enacted, would make professional team sports subject to the antitrust laws, but would specifically exempt from those laws certain practices considered essential to the successful operation of these sports.[80] The seven bills formed the basis

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could "find no basis for attributing to Congress a purpose to put baseball in a class by itself." Therefore, they "would adhere to the rule of stare decisis and affirm the judgment below." Id. at 456.

[73] Id. at 452.

[74] Ibid.

[75] Radovich settled his case against the National Football League on April 15, 1958. See N.Y. Times, Apr. 16, 1958, p. 42c, col. 8.

[76] H.R. 5307, H.R. 5319, H.R. 5383, H.R. 6876, H.R. 6877, H.R. 8023, and H.R. 8124 were introduced by members of the House of Representatives in the 1st session of the 85th Congress. No bills were introduced by the Senate. Copies of the bills introduced appear in Hearings before the Antitrust Subcommittee of the House Committee on the Judiciary, 85th Cong., 1st Sess. ser. 8, pt. 1, at 3-5 (1957). Hereafter cited as Hearings on Team Sports.

[77] H.R. 5383.

[78] H.R. 5307 and H.R. 5319.

[79] H.R. 6876, H.R. 6877, H.R. 8023 and H.R. 8124.

[80] H.R. 6876 and H.R. 6877 would exempt playing rules of the game; organization of leagues and associations; territorial agreements; and employment of players. The bills also contain language guaranteeing players the right to bargain collectively and to engage in any "other concerted activities for their mutual aid or protection." H.R. 8023 and H.R. 8124 are exactly the same as these other two bills except H.R. 8023 provides for a modified reserve clause, and H.R. 8124 exempts the "selection" as well as the "employment" of players in order to make sure draft procedures used in professional football and basketball are protected from the antitrust laws.

for the hearings on organized professional team sports held during the summer of 1957 by the House Subcommittee on Antitrust.

In October 1957, shortly after the congressional hearings had come to a close, the National Hockey League Players' Association brought a treble damage action against various individuals and teams engaged in the business of professional hockey.[81] This marked the first time that an antitrust suit had ever been filed against organized professional hockey. The complaint alleged that the defendants have "monopolized and obtained complete domination"[82] over the professional hockey business, including the terms and conditions of players' employment, with the result that players have been deprived of their right to negotiate with various competing bidders to obtain full and fair compensation for their services. The players have thereby claimed damages to the sum of one million dollars.[83]

On January 30, 1958, the House Antitrust Subcommittee recommended a bill to the Judiciary Committee.[84] The bill provides that the antitrust laws shall apply to professional baseball, basketball, football and hockey, but specifically exempts from those laws any

> activity among teams or groups of teams engaged in these organized professional team sports which is *reasonably* necessary to—(1) equalization of competitive playing strengths; (2) the right to operate within specific geographic areas; or (3) the preservation of public confidence in the honesty in sports contests.[85]

The bill is designed to exempt from the antitrust laws those sports activities reasonably necessary for the preservation of these games. Its major problem is lack of definiteness. Just what is reasonable? Obviously, it will take a great deal of litigation to find out. The bill has already received some acute criticism, and there is some doubt as to whether it will be passed.[86]

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[81] National Hockey Leaue Players' Association v. Boston Professional Hockey Ass'n, Civil Action No. 125-275, S.D.N.Y.

The National Football League Players Association threatened to bring a similar antitrust suit against the National Football League. However, the Association settled their differences with the League and the action was never commenced. This information is based on a letter dated Dec. 11, 1957 sent to me by Creighton E. Miller, counsel for the National Football Players' Association, and is on file in the Yale Law School Library. See also New York Daily News, Nov. 22, 1957, p. C20, col. 1; Dec. 4, 1957, p. C20, col. 2.

[82] Par. 6 of the complaint in National Hockey League Players' Association v. Boston Professional Hockey Ass'n, supra note 81.

[83] The one million dollars will be trebled in event of judgment for the plaintiffs. The plaintiffs have moved for summary judgment, but the motion bad not been argued at the time of this writing.

[84] H.R. 10378, 85th Cong., 2d Sess. (1958). The Judiciary Committee is the parent committee of the House Antitrust Subcommittee. H.R. 10378 was approved by the Judiciary Committee on May 13, 1958. However, the vote was an extremely close one. See N.Y. Daily News, May 14, 1958, p. C27, col. 1, and May 15, 1958, p. 80, col. 2.

[85] Emphasis added. H.R. 10378, 85th Cong., 2d Sess. (1958).

[86] See Holeman, Okay Reserve Clause Aid Bill, N.Y. Daily News, Jan. 31, 1958, p. C20,

In summary, then, with the exception of baseball, all professional team sports have been held subject to the antitrust laws.[87] However, the exact nature and extent to which the organization and practices of these sports will be affected by the application of the antitrust laws is as yet unknown.[88] The Supreme Court has urged Congress to work out the problem of what exemptions, if any, should be granted to professional team sports.[89] The House Antitrust Subcommittee has held hearings on the subject[90] and has reported out a bill, but the actual enactment of legislation appears to be some time off.[91]

II. Organization and Practices of Professional Team Sports

Athletic competition is the life-blood of professional team sports. Without a substantial amount of it, spectator interest would soon wane, and the financial difficulties which would follow would lead to serious deterioration, if not to the complete elimination, of these sports as they are known today. Professional team sports have promulgated elaborate rules and regulations which govern their activities. Spokesmen for these sports have said that such rules and regulations are absolutely necessary to promote and maintain competition between teams on the playing field.[92] Naturally, in order to make and execute these "laws," the several clubs in each league must cooperate as partners. Thus, it is argued that the business of professional team sports is unique in that no other industry requires its competitors to cooperate as partners; as this cooperation and combination have raised the question of Sherman Act violation, team sports should be granted exemption from the antitrust laws.[93]

On the other hand, some critics have vehemently argued that athletic and economic ruin would not follow the application of the antitrust laws

col. 3; N.Y. Herald Tribune, Jan. 31, 1958, § 3, p. 1, col. 3 and p. 10, col. 7. See news report on bill introduced by Rep. Rogers in N.Y. Times, Feb. 25, 1958, p. 35, col. 4.

87 Individual sports, of course, are subject to the antitrust laws. See note 65 supra.

88 Compare the approach taken by Judge Grim in United States v. National Football League, 116 F. Supp. 319 (E.D. Pa. 1953), with that taken by Judge Frank in Gardella v. Chandler, 172 F.2d 402 (2d Cir. 1949).

89 Radovich v. National Football League, 352 U.S. 445, 452 (1957).

90 The House Antitrust Subcommittee (formerly Subcommittee on Study of Monopoly Power) held hearings on baseball in 1951 and on team sports in 1957.

91 The bill reported out by the House Antitrust Subcommittee must be approved by a majority of the House Judiciary Committee, and must be voted on by the House. If the House passes it, the bill must go through a similar procedure in the Senate. If there are differences between the two Houses as to the nature of the legislation, they must be ironed out in joint committee sessions before legislation can be enacted.

92 See, e.g., statements of baseball's Commissioner Frick, and football's Commissioner Bell in Hearings on Team Sports, pt. 1, at 166, and pt. 3, at 2724-45.

93 See Hearings on Team Sports, pt. 1, at 164-72 (Baseball's Commissioner Frick); pt. 3, at 2734 (Football's Commissioner Bell); at 2894-95 (Basketball's President Podoloff); and at 2986 (Hockey's President Campbell). These spokesmen would like to have team sports completely exempt from the antitrust laws, but apparently would be glad to get a partial exemption.

to professional team sports.[94] They contend that the principal effect of these self-regulating systems has been to guarantee organized professional baseball, basketball, football and hockey virtual control over two markets: the market for purchasing players' services, and the market for selling exhibitions of professional team sports to the public.[95] They argue that due to the monopolistic and monopsonistic positions held by these sports, as organized today, it is practically impossible for anyone to gain entry to these businesses without becoming a part of the existing organizations.[96] Moreover, it is said these organizations have cooperated to control effectively the price of players' services.

The pros and cons outlined above clearly indicate that a decision as to whether any exemption should be allowed is dependent upon a basic understanding of the organization and practices of these sports. The ensuing discussion will undertake, among other things, to describe the organizational structures of these sports, to emphasize those practices which have antitrust implications, and to point out the arguments for and against each of these practices.

Baseball

The Government of Organized Professional Baseball extends from the Arctic Circle to the Equator. It consists of 29 leagues, made up of 210 clubs, representing 212 cities in Canada, Cuba, Mexico and the United States.[97] At the top of the hierarchy are the two major leagues, and the remaining leagues compose the minor leagues.[98]

The clubs are governed by several important documents. Each league has its own constitution and by-laws.[99] The Major League Agreement and Major League Rules bind the two major leagues together and regulate the conduct of their players and team owners. The National Association Agreement governs the minor leagues. The Major League-National Association Rules are designed to cover matters the two categories of leagues have in common, such as working agreements between major and minor league teams, "bonus player" rules, and major league selection of minor league players. Finally, the Professional Baseball Agreement further defines the inter-relationship between the major and

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94 E.g., Topkis, "Monopoly in Professional Sports," 58 Yale L.J. 691 (1949).

95 Cf. Comment, 62 Yale L.J. 576 (1953); House Report 77, 228.

96 What happened in football and baseball tends to prove the correctness of this statement. See text supra at notes 27 and 67. The history of baseball also provides other examples. See House Report 27-29 (the Union Ass'n War); 33-36 (the Players League War); and 50-59 (the Federal League War).

97 The Baseball Blue Book 12 (1957).

98 The minor leagues are divided into classes based primarily on the talent of the players in each league. At the top of the classification scale are the Open Class and Class AAA, followed by Classes AA, A-1, A, B, C, and D.

99 See Hearings on Team Sports, pt. 1, 391-1183, and pt. 2, 1394-1404; 1417-88.

minor leagues.[100] These constitutions and agreements are administered primarily by the Commissioner of Baseball, the President of the National Association, and the presidents of the various leagues.[101]

The Commissioner of Baseball is the titular head of organized baseball. He is selected by the major league club owners, and his powers and functions, as defined by the agreements previously referred to, extend to both major and minor league matters. He is assisted in his administrative duties by an Executive Council, which consists of the president of each major league, and two major league club owners, one elected by each league. However, on all matters concerning the uniform players' contract, players are represented on the Council by an active player, chosen by his fellow players, from each major league.[102]

The President of the National Association is selected by the minor league club owners. He is regarded as the chief executive officer of the minor leagues. However, he does not operate completely independent of the Commissioner's office. Many of his decisions are subject to final approval by the Commissioner. He is aided by an Executive Committee which consists of three minor league club owners elected by the other members of the Association.[103]

The remaining group of significant administrators in the government of organized baseball are league presidents. Each, of course, is chosen by the members of his particular league. The scope of his authority is defined in the constitution and by-laws of the league.[104]

Aside from prescribing the powers and functions of those who administer them, the rules and regulations of organized baseball govern a myriad of practices. Several have serious antitrust implications. Foremost among these is the "reserve clause."

Every player in organized baseball is subject to the reserve clause. Although the uniform players' contract for major league players differs, in certain particulars, from the one for minor league players, the reserve clause in each has the same effect.[105] These contracts are for one year. Each gives the club the option to renew, on substantially the same

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100 The agreements which govern organized baseball appear on pages 500-809 of The Baseball Blue Book (1957).

101 For further consideration of the functions and powers of these officials see Hearings on Team Sports, pt. 1, at 91-114; 122-72; 174-82; 182-217; pt. 2, 1343-58; 1358-77.

102 See Major League Agreement, Articles I and II.

103 See National Association Agreement, Articles Three, Four and Six.

104 E.g., Art. Five, § 5.3 of the National League Constitution. See also note 99 supra.

105 As would be expected the uniform contract for the major leagues is more beneficial to the player than the one for the minor leagues. Compare the minor league contract set forth in Hearings on Team Sports, pt. 1, at 382 with the major league contract in same Hearings, pt. 2, at 1491. For further discussion on the differences between the two contracts, see House Report 112-27.

terms,[106] for the following year. As this right to renew is itself a term of the contracts, the renewal clause obviously results in giving the club a perpetual option on players' services.

However, the term "reserve clause" implies more than the option to renew. It carries with it the connotation that if a player violates the clause in any way, organized baseball may impose certain sanctions against the player, such as blacklisting him. Organized baseball justifies its authority for penalizing a reserve clause violator in this way: Every player's contract, of which the reserve clause is a part, provides that the player signing it must agree to accept and comply with all provisions of the constitutions and agreements of organized baseball which concern player conduct and player-club relationships, and with all the decisions of baseball executives made pursuant thereto.[107] Thus, the rules and regulations to which the player agrees to be bound include the means of penalizing him for violating the reserve clause.[108]

At this point the question may logically be raised as to why organized baseball does not rely on the courts to enforce breaches of the reserve clause. To answer that question one must first understand the remedy a club seeks when it considers that a player has violated the reserve clause. The club is not interested in money damages,[109] but in requiring the player to perform his contract or preventing him from working elsewhere. Thus, the club wants an equitable rather than a legal remedy. It is basic that the policy against involuntary servitude prevents a court of equity from forcing a person to work against his will, and makes it reluctant to restrain an employee from working elsewhere. However, in the case of an employee whose talents are unique, courts may enjoin that employee from working for a competitor of his employers on the basis of the doctrine first enunciated in the case of *Lumley v. Wagner*.[110]

Many clubs have brought suits against alleged reserve clause violators on the basis of the *Lumley v. Wagner* doctrine. However, on the whole,

[106] In major league contracts the club can renew for the same terms except that the player's salary may not be reduced more than 25 per cent. In minor league contracts, if the parties fail to agree on compensation at the time of renewal, the dispute is arbitrated by the Executive Committee or the President of the National Association.

[107] Major League Uniform Player's Contract, Clause 9(a); Minor League Uniform Player's Contract, Clause 9.

[108] Although there are a number of rules and regulations which relate to the reserve status of a ball player, the ones dealing most specifically with sanctions imposed for reserve clause or contract "jumping" are Rules 15 and 16 of the Major League Rules and Rules 15 and 16 of the Major League-National Association Rules. For a detailed historical analysis of the "reserve clause" see House Report 22-26, 46, 111-77.

[109] Moreover, damages may be too speculative for the club to prove. See Note, 32 Va. L. Rev. 1164, 1172 (1946).

[110] 1 De G. M. & G. 604, 42 Eng. Rep. 687 (Ch. 1852). Miss Wagner, the famous opera singer, was enjoined from performing for a competitor of her employer on the ground that her talent was so unique as to make her irreplaceable. The Lumley doctrine was first brought into American law by McCaull v. Braham, 16 Fed. 37 (C.C.S.D.N.Y. 1883).

these clubs have been unsuccessful.[111] As a result, organized baseball does not depend on the courts for enforcement, but relies on its own sanctions.

Baseball has surrounded the reserve clause with certain safeguards to prevent its abuse. Without these, the reserve clause would certainly be most unfair to players, and would have some harmful effects on owners. For instance, if there were no safeguards, a wealthy owner could purchase a vast number of players and keep them on his roster even though he played relatively few of them. The purpose of such a maneuver would be to bar his competitors from playing talent. The effect would be injurious to both players and owners. Many players would be denied the opportunity to play. At the same time they would be deprived of the right to have any other clubs bid for their services. Moreover, the club owner could exercise unlimited discretion in cutting the salaries of the players he had under contract. Other club owners would suffer from such an arrangement because they would be completely excluded from a substantial source of unused playing talent.

Examples of how a completely unrestricted reserve clause might operate to the detriment of players and owners could be multiplied. However, the one stated suffices to illustrate the point. The principal safeguards adopted by organized baseball to prevent such inequities include the player draft, waiver rule, minimum salary requirement, salary arbitration, and player limit.

Although the draft is of benefit to club owners in that it helps to maintain an open supply of players for the collective good of all clubs, its basic purpose is to provide a player with a reasonable opportunity to advance from a lower classified league to the highest classification that his skills merit. The rule gives a club of higher classification the right to select at the end of the season the contract of a player in a lower classification.[112]

The major leagues have the first choice in the selection system. Each team is entitled to pick one eligible player[113] from a minor league club. Choices are made in reverse order of standings of the clubs in each

111 Occasionally clubs have been successful in these suits. Perhaps the most famous example is the case of Philadelphia Ball Club v. La Joie, 202 Pa. 210, 51 Atl. 973 (1902). In most cases, however, for a variety of different reasons, the courts failed to grant the plaintiff relief. One of the most common reasons for refusing to enforce the reserve clause was lack of mutuality. For a detailed discussion of suits brought to enforce the reserve clause see Johnson, "Baseball and the Law," 73 U.S.L. Rev. 252 (1939). See also Notes, 46 Yale L.J. 1386 (1937); 32 Va. L. Rev. 1164, 1168-73 (1946) and House Report 127-33.

112 See Major League-National Association Rule 5 and Art. Twenty-Seven of the National Association Agreement.

113 Major League-National Association Rule 5(g) prescribes which players are eligible for draft. Generally speaking, players must have had a specified amount of experience in the minors before they can be drafted by a major league club. See p. 584 infra.

league, and the National League alternates each year with the American League on first selection. Thus, the eighth-place clubs have selections 1 and 2 respectively, and in one year the last place American League club will have first choice and in the next the eighth-place National League club will have first pick. The process of selection is repeated until each club has no further right of selection[114] or has signified that it does not desire to select further. The price paid to a minor league club for any player drafted is standardized, ranging from $15,000 for an Open Classification choice downward.[115]

After the major leagues exercise their draft choices the minor leagues, with priority based on classification, make their selections. Thus, the Open Classification league comes first, followed by the Triple A leagues and so on. The method of selection is otherwise substantially similar to that of the major leagues described above.[116]

Closely related to the draft rule is the waiver rule. The draft rule is designed to permit a player to advance to as high a classification as his skills merit. One of the aims of the waiver, on the other hand, is to prevent a player from being dropped to a classification lower than his abilities warrant. The other is to give club owners in the player's league an opportunity to claim him before he is assigned to a league of equal or lower classification. The gist of the rule is that before a player can be assigned to play in a league of equal or lower classification his services must be offered to the other club owners in the league in which he is currently playing.[117] The amount another team has to pay for a player on waiver is specifically set forth in the rules.[118]

Other safegnards to counter abusive use of the reserve clause inelude a minimum salary requirement in the major leagnes and a provision for salary arbitration in the minors. A major leagne player must be paid at least $6,000 per year which is far below the average salary of $15,000 currently paid to big league ball players.[119] This minimum salary proviso, coupled with the elause in the major league uniform player's contract prohibiting a cut of more than 25 per cent from one season to

[114] This results because there are limitations on the number of players any team may have under contract. See Major League-National Association Rule 2(a).

[115] Professional Baseball Agreement, Art. VI, § 2.

[116] See National Association Agreement, Art. Twenty-Seven, § 27.04.

[117] See Major League Rule 10 and National Association Agreement, Art. Twenty-three. Frequentiy major league teams use the waiver device for trading purposes. Major League Rule 10(i) permits a club to put a player on waiver twice in a calendar year and then to withdraw his name when he is claimed by another club. This procedure enables the player's club to get an idea of the player's value on the market. This information is helpful in planning trades or sales of player contracts.

[118] Major League Rule 10(k) and National Association Agreement, art. 23, § 23.02(b)-(4)(F).

[119] See Hearings on Team Sports, pt. 1, 170.

the next, constitutes the major leaguer's protection against unreasonable reductions in compensation.[120] The minor league player does not enjoy a minimum salary requirement. However, he does have a certain degree of protection. If he fails to agree on compensation, he can have the matter arbitrated by the Executive Committee or the President of the National Association.[121]

Another significant safeguard is the player limit, which is a limitation on the maximum number of players each team can have under contract.[122] The illustration given at the commencement of this discussion on protective devices to avoid abusive use of the reserve clause shows the importance of such a requirement to owners and players alike. However, a congressional subcommittee raised the question whether the spirit, if not the letter, of the player limit rule was being violated.[123] Members of that committee contended that the farm system contravened the very purpose of the rule since it permitted major league clubs to control indirectly an unlimited number of players. To date, baseball has not acted on this critique, and probably never will voluntarily, because to do so would involve the destruction of the farm system, the maintenance of which many affiliated with baseball consider important to the sport.[124]

The player limit rule has not been the only safeguard to be criticized. At the hearings held by the House Antitrust Subcommittee, several witnesses, including Commissioner Frick and various players, testified that under the existing draft and option rules, a major league club could keep a player in the minors for seven years, and this was unfair to the game of baseball as well as to the player concerned.[125] As an athlete's playing life in baseball averages about fifteen years, they considered seven years was too long for a team to be able to hold a player with major league talent in the minors. This criticism was acted upon at the joint meeting of the Major Leagues on December 6, 1957. At that time the rules were amended to provide for the unrestricted draft of players with four years experience in organized baseball.[126] Thus, the amount of time a player can be arbitrarily held in the minors has been reduced to four years.

The safeguards in baseball are not perfect. No one realizes this more

120 Major League Uniform Player's Contract, clauses 2 and 10(a).
121 Minor League Uniform Player Contract, clause 11.
122 Major League Rule 2 and Major League-National Association Rule 2.
123 House Report, 154-56.
124 The farm system is discussed in further detail infra at note 177.
125 Hearings on Team Sports, pt. 1, at 170-71, 1241-43, 1277; pt. 2, at 1313, 1315-16. See also Major League-National Association Rules 5(g) and 11(L).
126 This information was secured from a statement of the legislation adopted at the joint meeting of the major leagues supplied to me by Louis F. Carroll, Esq., attorney for the Commission of Baseball and for the National League. Statement is on file in Yale law library.

than organized baseball itself.[127] However, it would be unfair to say that baseball is not interested in improving these safeguards. In those instances where experience has demonstrated the need for change, baseball has responded reasonably well.

Up to this point we have described the so-called reserve clause practice. We started with the clause as it exists in major and minor league players' contracts; then showed how organized baseball justifies its authority to impose sanctions on reserve clause violators; continued by demonstrating why baseball does not rely on the courts to enforce the reserve clause; and completed the description by discussing the safeguards organized baseball has placed on possible abuse of the reserve clause. Attention is now turned to the arguments for and against the reserve clause practice. All arguments considered will have some relationship to the application of the antitrust laws.

Suppose Congress should enact legislation making baseball subject to the antitrust laws and subsequent suit should be brought.[128] What arguments could baseball muster in defense of the reserve elause?

Under such circumstances, attorneys for the sport would probably contend that even though the business of baseball in general is subject to the antitrust laws, the reserve clanse is not. Two jurisdictional arguments would be advanced to sustain this position. The first would be along the lines of Judge Chase's dissent in the *Gardella* case.[129] There, Judge Chase contended that Congress, in the enactment of the antitrust laws, intended for them to cover restraints upon commercial competition in the marketing of goods and services, not restraints upon employment. Therefore, he asserted, the reserve clause, which is essentially a device to control and regulate labor, is not subject to the antitrust laws, and any problems concerning it fall into the realm of labor-management relations rather than antitrust.

If suit should be brought against baseball involving a player who had been blacklisted, the second argument would come into play. Baseball would contend that its refusal to employ such a person resulted from a labor dispute, and therefore its action should not be held subject to the

127 Commissioner Frick in speaking of the draft and waiver rules said, "These rules . . . have in general served their purpose. But they are not perfect and baseball has an awareness of that fact." Hearings on Team Sports, pt. 1, at 170.

128 If Congress should decide to do this, it would probably enact H.R. 5307 or H.R. 5319 which were introduced in 85th Cong., 1st Sess. (1957). They are identical and the most significant portion of each bill states: "The words 'trade or commerce' as used in any provisions of the antitrust laws shall include the interstate business of organized professional baseball." These legislative proposals would overrule Federal Baseball and Toolson. Those cases held that the business of baseball was not interstate commerce. H.R. 5307 and H.R. 5319 declare that baseball is interstate commerce. See p. 578 supra.

129 See p. 571 supra. See also Apex Hosiery Co. v. Leader, 310 U.S. 469, 500-01 (1940).

Sherman Act. It would rely primarily on the Norris-LaGuardia Act,[130] section 20 of the Clayton Act,[131] and *United States v. Hutcheson*[132] to uphold its position.

In labor disputes involving restraints upon trade or commerce, the *Hutcheson* case requires that the two mentioned Acts and the Sherman Act be read together.[133] The Norris-LaGuardia Act includes as a "labor dispute" any controversy concerning terms or conditions of employment between one or more employers or associations of employers and one or more employees regardless of whether or not the disputants stand in the proximate relation of employer and employee.[134] Section 20 of the Clayton Act states in part:[135]

> . . . no . . . restraining order or injunction shall prohibit any person or persons, whether singly or in concert . . . from ceasing to patronize or to employ any party to such dispute, or . . . persuading others by peaceful and lawful means so to do; . . . nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.

Thus, organized baseball would conclude that its concerted refusal to deal with a player is outside the scope of the Sherman Act.

If these jurisdictional arguments failed, baseball's attorneys would emphasize the vital importance of the reserve clause system. The classical argument in favor of the reserve clause is that if it were eliminated there would be a chaotic scramble for player talent. The result would be that the best players would join the clubs which could pay them the most money. Poorer clubs would be unable to compete for top talent, and therefore, would be no match for the richer teams on the playing field. Without competition, spectator interest would wither, leading first to financial failure of the weaker clubs and eventually to the destruction of the entire league.[136] Such a line of reasoning is a bit more than an exercise of logic. The early history of baseball reveals that this was exactly what happened in the days before there was a reserve clause.[137]

Another argument offered in support of the reserve clause is that it helps to preserve the integrity of the game on the field. Without this clause, it is said that most players would probably be continuously shopping around for a better job with another club for the next season; some might be inveigled into "throwing"games to get a more lucrative

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130 47 Stat. 70-73 (1932), 29 U.S.C. §§ 101-15 (1952).
131 38 Stat. 738 (1914), 29 U.S.C. § 52 (1952).
132 312 U.S. 219 (1941).
133 Id. at 231-32.
134 47 Stat. 73 (1932), 29 U.S.C. §§ 113(a), 113(c) (1952). See also Comment, 62 Yale L.J. 576, 614-15 (1953).
135 38 Stat. 738 (1914), 29 U.S.C. § 52 (1952).
136 See Hearings on Team Sports, pt. 1, at 166; pt. 2, at 2725.
137 House Report 16-22.

contract for the following year. Thereby, public confidence in the game would be impaired. As in the case of the previous argument, this one too is buttressed by the early history of baseball.[138]

A third reason given for favoring the reserve clause is that a great many of the teams in the minor leagues are not operated on the basis of financial gain. It is said that they are maintained and financed in many instances by citizens who take civic pride in having a team represent their community. If these clubs did not have the protection of the reserve clause to give them reasonable assurance of continuity of player personnel, the incentive to maintain these clubs would be lost.[139]

These three arguments coupled with the assertion that baseball is a unique enterprise, requiring the cooperation of its members as partners in order to maintain and promote equality of competition, would form the basis for the contention that under the rule of reason the reserve clause practice does not violate the Sherman Act. In support of this position, baseball would undoubtedly lean heavily on *United States v. National Football League* and seek comfort in the *Appalachian Coals*[140] and *Chicago Board of Trade*[141] cases. In these cases, despite arguments by the government that the restraints involved were per se violations of the Sherman Act, the courts considered evidence showing why these restraints were reasonable under the particular circumstances.

Furthermore, those representing baseball might try to draw an analogy between organized team sports and organized markets or exchanges, such as the Chicago Board of Trade, New York Coffee and Sugar Exchange, and New York Cotton Exchange. Organized markets are similar in certain respects to organized team sports. For instance, an exchange is a combination of persons whose cooperation is essential to its operation. These persons cooperate in establishing a multitude of rules and regulations to govern the conduct of those who participate on the exchange. These rules also provide for disciplinary action against members who break them. However, the Supreme Court has never held that an exchange in the course of its ordinary operations is illegally operating in restraint of trade.[142] That Court has consistently refused to declare such rules to be in violation of the antitrust laws. Time and time again it has held that they are reasonable regulations which are needed to carry on efficiently the business of those exchanges, and in no way unduly restrain trade or commerce.[143] Therefore, it might be contended that the rules

138 See Hearings on Team Sports, pt. 1, at 167.
139 Id. at 212.
140 Appalachian Coals, Inc. v. United States, 288 U.S. 344 (1933).
141 Board of Trade of City of Chicago v. United States, 246 U.S. 231 (1918).
142 Baer & Saxon, Commodity Exchanges and Futures Trading 270-02 (1949).
143 See, e.g. Cargill, Inc. v. Board of Trade of City of Chicago, 164 F.2d 820 (7th Cir.

and regulations of organized baseball, just as those of organized markets and exchanges, are necessary to the successful operation of the sport and are reasonable under the antitrust laws.

There are a number of substantial arguments which may be offered in opposition to the reserve clause itself, as well as to meet the jurisdictional arguments raised earlier. With respect to the latter, the replies of Judges Hand and Frank to Judge Chase in the *Gardella* case make a suitable starting point.[144] Judge Hand contended that the Sherman Act prohibits all restraints which were unlawful at common law. A contract which unreasonably forbids a person to practice his trade is one of these. Therefore, according to Judge Hand's logic, should the reserve clause be found to restrict unreasonably a professional ball player from plying his trade, it would violate the Sherman Act. Judge Frank reached the same conclusion by different reasoning. He believed that the Supreme Court, in a series of decisions concerning medical services and motion pictures,[145] had interpreted "trade or commerce," as those words are used in the Sherman Act, to include personal services. Consequently, he concluded that an undue restraint upon employment would violate that Act.

Moreover, it could be argued that if Congress enacted legislation placing baseball under the antitrust laws, it would intend for the entire business of baseball, including the reserve clause, to be subject to those statutes. To substantiate this statement references could be made to many portions of the congressional hearings at which bills on this subject were cousidered.[146]

With respect to the second jurisdictional argument, namely, the exemption of blacklisting from the operation of the Sherman Act, the point could be made that Congress never intended an association of employers to be able to deprive an individual unorganized worker of his means of earning a livelihood without being subject to the Sherman Act. It would be argued that the purpose of the Norris-LaGuardia and Clayton Acts, the laws upon which the alleged exemption depends, is to permit labor

1947), cert. denied, 333 U.S. 880 (1948); Moore v. New York Cotton Exchange, 270 U.S. 593 (1926); United States v. New York Coffee and Sugar Exchange, Inc., 263 U.S. 611 (1924); Board of Trade of City of Chicago v. United States, 246 U.S. 231 (1918). For an excellent, brief discussion of the antitrust aspects of exchanges see Note, 64 Yale L.J. 906 (1955).

144 See p. 572 supra.

145 Judge Frank relied on the following cases: Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251 (1946); American Medical Association v. United States, 317 U.S. 519 (1943); Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1939); United States v. First National Pictures, Inc., 282 U.S. 44 (1930); Paramount Famous Lasky Corp. v. United States, 282 U.S. 30 (1930); Binderup v. Pathe Exchange, Inc., 263 U.S. 291 (1923).

146 See, e.g., Hearings on Team Sports, pt. 1, 2, 6-7.

unions and employers to engage in collective bargaining without the threat of antitrust harassment, and not to cover situations unrelated to the collective bargaining process. Therefore, while a concerted refusal to deal growing out of a labor dispute connected with collective bargaining would be exempt from the Sherman Act, a similar concerted action against an individual unorganized employee would not.[147]

Perhaps the most powerful argument that can be advanced against the reserve clause practice is that it can be used as an economic weapon to exclude outside competition. The history of organized baseball is sprinkled with examples of how the reserve clause has been used for such purpose.[148] A brief hypothetical illustration will suffice to demonstrate how this is done.

Suppose a group of businessmen wanted to start a third major league without becoming affiliated with organized baseball. These men would find it extremely difficult to hire good players because they would be under perpetual contract with a club in organized baseball. If, however, some did join the new league, not only would they be blacklisted by organized baseball, but the teams on which they played would be unable to hold games in ball parks owned by persons connected with organized baseball.[149] Moreover, these "renegade" players would find that they could not make off-season money by "barnstorming" since the players in organized baseball would be barred from playing either with or against the reserve clause "jumpers."[150] Under such strong economic coercion, there would be little chance of the new league surviving very long.[151]

In short, then, the contention is that the use of the reserve clause practice in this manner amounts to a combination to exclude competition, and should be held illegal under the Sherman Act.[152]

Another reason advanced in opposition to the reserve clause is that it forces the player to give up so much of his freedom that he is reduced to

147 See Comment, 62 Yale L. J. 576, 615-21 (1953); Note, 53 Colum. L. Rev. 242, 249 n.71 (1953).

148 See note 96 supra.

149 See House Report 114.

150 Id. at 79.

151 At the congressional hearings in 1957, Commissioner Frick testified that there is no rule barring prompt reinstatement of a player who jumps to an outside league and said that there are cases on record of players who, in recent years, have jumped their contract and have been reinstated. It is true that Major League Rule 15 does permit the commissioner to reinstate a reserve clause violator promptly. However, the section also gives the commissioner the power to blacklist such a player. The fact that Commissioner Frick has been benevolent and allowed several players to be reinstated does not mean that the commissioner lacks the power to deny reinstatement. It should be kept in mind that not since the Mexican League War in the late 1940's has organized baseball been threatened by outside competition. Therefore, it could afford in more recent years to have a magnanimous attitude toward erring players. See Hearings on Team Sports, pt. 1, 122-24.

152 See Associated Press v. United States, 326 U.S. 1 (1945); Fashion Originators' Guild of America, Inc. v. Federal Trade Commission, 312 U.S. 457 (1941); Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600 (1914). See also note 225 infra.

a status tantamount to peonage; therefore, it is contrary to the spirit of the Constitution and public policy. Judge Bissell took this view in *American League Baseball Club of Chicago v. Chase.*[153] It was also expressed by Judge Frank in the *Gardella* case,[154] and by others interested in the game.[155]

Finally, it may be claimed that the reserve clause is a price-fixing device. The gist of the argument is that each player must sell his services to the team which has him under reservation. If he dislikes the terms offered, he is unable to sell his services elsewhere because of agreement among clubs in organized baseball not to compete for services of a player reserved by a member club. It is contended that the effect of this arrangement is to permit each club to fix its own prices in the player market; a per se violation of the Sherman Act.[156]

In concluding this discussion of the reserve clause, it should be pointed out that the vast majority of those who have studied baseball agree that some sort of reserve clause is absolutely necessary "to protect the integrity of the game or to guarantee a comparatively even competitive struggle."[157] Although there have been a number of proposals recommending modification of the reserve clause practice, there have been relatively few suggesting its abandonment.

Let us now proceed to the next practice having important antitrust implications—territorial rights. This practice and the reserve clause have been called the "keystones of organized baseball."[158]

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153 86 Misc. 441, 465-66, 149 N.Y. Supp. 6, 19 (N.Y. Sup. Ct. Erie County 1914).

154 172 F.2d at 409-10.

155 See, e.g., Baseball Hearings 912.

156 One writer has argued that the reserve clause falls squarely within the doctrine of United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 150 (1940). Comment, 62 Yale L.J. 576, 622 (1953). See also Anderson v. Shipowners Ass'n of the Pacific Coast, 272 U.S. 359 (1926); H. B. Marienelli, Ltd. v. United Booking Offices of America, 227 Fed. 165 (S.D.N.Y. 1914). But cf. Appalachian Coals, Inc. v. United States, 288 U.S. 344 (1933); Board of Trade of City of Chicago v. United States, 246 U.S. 231 (1918). In the latter case at page 238, the Court said:

> . . . the legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.

Using the Chicago Board of Trade and Appalachian Coals cases as a foundation, a court may find that the reserve clause is so important for promoting competition; keeping professional team sports economically sound; and ensuring integrity on the playing field that the agreement among club owners not to bid against each other for the services of players is a reasonable restraint of trade.

157 House Report, 229.

158 This statement was made by Commissioner Frick. Hearings on Team Sports, pt. 1, at 168.

In essence, the rules governing territorial rights control the location of all teams and leagues in organized baseball.[159] They provide the procedure for the relocation of clubs and the realignment of leagues as well as for the reclassification of a minor league team to major league status. The principal point to bear in mind from an antitrust viewpoint is that these rules provide for the various teams in organized baseball to combine for the purpose of dividing geographical territories and markets.

Just as in the case of the reserve clause, there are weighty arguments for and against territorial rights. Those who support the practice claim that without it baseball would be faced with a perilous economic situation.[160] Teams would be able to shift around at will. Several teams might move to a city which could support only one, and each would suffer financial hardship; possibly all would be driven out of business. Moreover, it is said that under such economic conditions it would be difficult to attract the investment capital baseball needs to operate successfully. To this may be added the contention that the financial inequities which might arise from this unstable economic situation could have a variety of detrimental effects on the athletic competition between teams. Finally, the argument may be made that under these uncertain financial conditions many young men graced with the necessary athletic ability would no longer seek baseball as a career and the quality of the competition would vastly deteriorate with the result that the American public would no longer enjoy the high caliber game of today.[161]

The argument against territorial rights runs this way: The division by organized baseball of territories and markets among competing teams necessarily has the purpose and effect of eliminating competition. Therefore, such an arrangement is a per se violation of the Sherman Act.[162]

Furthermore, in answer to the argument that the abolition of territorial rights would bring economic chaos to baseball, one in opposition to that practice could reply that a favorite admonition of monopolistic combinations in the past has been that if they were destroyed by court action, "ruinous competition" in their respective industries would inevitably follow.[163] In fact, the results forecast have never occurred. Freedom of

159 See Major League Rule 1; Major League-National Association Rule 1; and National Association Agreement §§ 10.06-10.08.

160 See, e.g., Hearings on Team Sports, pt. 1, at 168-69; 213-14.

161 As in the case of the reserve clause practice, baseball may also attempt to draw an analogy between organized team sports and organized markets or exchanges. See text supra note 142.

162 See Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951); United States v. National Lead Co., 332 U.S. 319 (1947); United States v. Addyston Pipe and Steel Co., 85 Fed. 271, 291-93 (6th Cir. 1898), aff'd, 175 U.S. 211 (1899). But cf. United States v. National Football League, 116 F. Supp. 319 (E.D. Pa. 1953).

163 E.g., United States v. Joint Traffic Ass'n, 171 U.S. 505, 576 (1898).

competition in the long run has brought stability to industries rather than economic destruction.

Before completing this phase of the discussion on territorial rights, it should be pointed out that the rules governing this practice do not prohibit anyone outside organized baseball from operating a team in any city he may choose.[164] However, in considering this factor, one must also keep in mind the powers possessed by organized baseball under the reserve clause. Although the regulations on territorial rights present no bar to the newcomer, those relating to the reserve clause do. As previously stated, by blacklisting players and refusing teams which employ them access to stadia controlled by it, organized baseball can make it extremely difficult, if not impossible, for any rival to operate successfully. In this regard, the reserve clause system serves to supplement the territorial rights practice.

Radio and television broadcasting is fundamentally part of the territorial rights problem. However, as broadcasting presents a rather unique problem of substantial importance, it is considered separately.

Both Commissioner Frick and Mr. Trautman, President of the National Association, testified before the House Antitrust Subcommittee that the broadcasts of major league games into minor league territories have an extremely harmful financial effect on minor league clubs.[165] There are two reasons for this. One is that people are reluctant to pay to see minor league teams play when they can sit at home and watch big league baseball on television for nothing. The other is that as local radio and television stations are able to broadcast major league games, they are not interested in sponsoring minor league games. The combined result of these two factors is that gate receipts of minor league teams have dwindled sharply in recent years as have their broadcasting revenues.

Organized baseball desired to alleviate this situation by making rules which would prohibit, or at least diminish, the number of major league broadcasts into minor league territories. However, when baseball officials broached this idea to the Department of Justice, they were warned that if rules restricting the sale of radio and television rights should be adopted, the Department would file an antitrust suit against organized baseball.[166]

While the business of baseball has been held to be exempt from the antitrust laws under the *Federal Baseball* and *Toolson* decisions, there is considerable doubt whether these cases would protect baseball from

164 See Baseball Hearings, 29; and Hearings on Team Sports, pt. 1, at 213.
165 Hearings on Team Sports, pt. 1, at 101-03; 190-01.
166 Id. at 102.

an antitrust suit based *solely* on its radio and television activities. These media of communication are clearly instrumentalities of interstate commerce, and while the internal operation of baseball itself is not subject to the antitrust laws, baseball's interference with radio and television rights may well constitute a section 1 violation of the Sherman Act.[167]

Section 1 provides that "every contract, combination . . . or conspiracy in restraint of trade or commerce among the several States" is illegal. Certainly it is plausible to argue that any agreement among major league teams not to allow their games to be telecast into minor league territories would place unreasonable restraints upon the radio and television industries.

The theory of "collective refusal to deal" would lend support to this position. The agreement in question would essentially keep all major league games off the air unless broadcasters agreed to blackout those games in minor league territories. Consequently, the agreement would represent a concerted refusal to sell major league games to the broadcasting industries unless certain conditions were met. Collective refusals to deal have been consistently viewed with suspicion by the Supreme Court.[168]

There is one case in particular which can be analogized to the proposed situation. It is the *Kiefer-Stewart* case.[169] There the defendants agreed not to sell their liquors to wholesalers unless they in turn agreed not to resell above maximum prices set by the defendants. With respect to this arrangement, the Supreme Court said that "the Sherman Act makes it an offense for respondents to agree among themselves to stop selling to particular customers."[170] Consequently, it would appear that the concerted refusal on the part of baseball to sell broadcasting rights to buyers unless they adhere to certain conditions would likewise be held to violate section 1 of the Sherman Act.

Furthermore, another line of reasoning may be offered in opposition to such an agreement. Radio and television have placed major league baseball in competition with clubs in the minors since major league clubs enter minor league territories via the airwaves and compete with minor league teams for customers in those markets. Consequently, the argument could be made that the agreement not to telecast into minor league territories would amount to an allocation or division of markets

167 Cf. United States v. National Football League, 116 F. Supp. 319, 327-28, (E.D. Pa. 1953) and the cases cited there.

168 See, e.g., Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 214 (1951); United States v. Columbia Steel Co., 334 U.S. 495, 522 (1948); Associated Press v. United States, 326 U.S. 1 (1945).

169 Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., supra note 166.

170 Id. at 214.

between the major and minor league teams which would be a per se illegal restraint under the Sherman Act.[171]

If baseball decides to cast aside the Department of Justice's admonition, and promulgates rules to keep major league broadcasts out of minor league territories, it must be prepared to prove that such restrictions on radio and television rights are essential to the successful survival of minor league baseball. Obviously the destruction of minor league baseball would have damaging consequences on players, owners, sports fans, and commercial enterprises doing business with minor league teams. Furthermore, without stable minor leagues, there would be a degeneracy in the caliber of major league baseball so that the public would be deprived of the high quality entertainment of the present day game. Therefore, it could be argued that it would be in the public interest to allow these regulations. If a court were swayed by such argument, it could decide in favor of organized baseball along the lines pioneered by Judge Grim in *United States v. National Football League*.[172]

One further question on the subject of broadcasting rights remains to be discussed. Assuming major league broadcasts are ruining minor leagues financially, nothing prevents each major league team, individually, from refusing to permit its games to be broadcast into minor league territories. The decisions of the Supreme Court, beginning with *United States v. Colgate & Co.*[173] in 1919, have consistently recognized an individual refusal to deal as a general right.[174] Exactly why each major league club has not acted on its own to save the minors is unknown. The question was put to Commissioner Frick at the House Antitrust Subcommittee hearings and he answered flatly, "I don't know."[175] Two "educated guesses" are advanced. One is that each team fears that if it restricts broadcasts and thus limits its revenues, other teams will not do likewise and it will be at a competitive disadvantage. The other is that the teams are afraid that such action may nonetheless be interpreted as a concerted refusal to deal under the doctrine of "conscious parallelism."[176]

Another practice with antitrust implications is the farm system. "When baseball clubs in leagues of lower classification are owned or

171 See note 162 supra.

172 Cf. Comment, 63 Yale L.J. 372, 387 (1954). See also note 161 supra.

173 250 U.S. 300 (1919).

174 The exception to this general rule occurs when the individual refusal to sell is "accompanied by unlawful conduct or agreement, or conceived in monopolistic purpose or market control." Times Picayune Pub. Co. v. United States, 345 U.S. 594, 625 (1953). See also Lorain Journal Co. v. United States, 342 U.S. 143, 155 (1951). I do not believe this exception applies to the instant situation.

175 Hearings on Team Sports, pt. 1, at 102.

176 For an excellent, brief discussion of "conscious parallelism" see Rep. Atty. Gen. Comm. to Study Antitrust Laws 36-42 (1955).

controlled by a baseball club of higher classification, normally a major league, they comprise a farm system or chain."[177] The control may result from stock ownership in the team of lower classification, or from working agreements.

A working agreement is a relationship between two clubs in which the club of higher classification agrees to do certain things for the lower club, and in return gains a certain degree of control over the management and players of the club of lower classification. These agreements are by no means uniform. The exact terms and conditions of each working agreement vary according to the relative bargaining power of the two teams involved. One working agreement may require a major league club to furnish a minor league team with a substantial number of things such as money, the benefit of the major league club's scouting system, a certain number of players, and so on, in order for the major league club to gain the player control it desires. Another agreement may permit the major league club to gain this control by giving up comparatively little.[178]

From what has been said, then, the chief objective of the farm system is to control baseball players in leagues of lower classification. This logically raises the question of whether this kind of vertical integration violates the Sherman or Clayton Acts.

Although the courts have not been consistent in their approaches to problems on vertical integration,[179] and although the present status of the law is not crystal clear,[180] a few basic tenets may nonetheless be stated. Vertical integration is not illegal per se and despite the uncertainty in this area, two tests seem definitely appropriate for guiding the application of the rule of reason. First, a vertical acquisition is illegal if it is part of a deliberate plan to control a substantial share of a market and suppress competition rather than an expansion to meet legitimate business needs. Second, a vertical acquisition is illegal whenever it results

177 House Report, 177.

178 See Baseball Hearings, 159-60; 206-07.

179 For a time courts seemed to move in the direction that vertical integration was illegal per se. United States v. Lehigh Valley R.R. Co., 254 U.S. 255 (1920); Compare United States v. Reading Co., 253 U.S. 26 (1920); United States v. New York Great A. & P. Tea Co., 173 F.2d 79 (7th Cir. 1949). This movement reached its climax with United States v. Yellow Cab Co., 332 U.S. 218, 226-27 (1947). There, the Supreme Court seemed to specifically state that vertical integration was illegal per se. However, the Court backed away from this position in United States v. Paramount Pictures, Inc., 334 U.S. 131, 173-74 (1948), and shortly later, in United States v. Columbia Steel Co., 334 U.S. 495, 524-25 (1948) made it doubly clear that vertical integration was not illegal per se. Compare the tests laid down for what constitutes illegal vertical integration in the Columbia Steel case (at 524-25) with the test stated by Judge Augustus Hand in United States v. Paramount Pictures, Inc., 85 F. Supp. 881, 893 (S.D.N.Y. 1949). See also United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586 (1957).

180 See Bork, "Vertical Integration and the Sherman Act: The Legal History of an Economic Misconception," 22 U. Chi. L. Rev. 157, 193-94 (1954).

in creating the power to exclude competition and is coupled with the purpose or intent to do so.[181]

When these tests are applied to baseball, substantial arguments, both pro and con, can be made with respect to the farm system. To explain baseball's defense, a bit of the history of the farm system is necessary.

Branch Rickey, perhaps more than anyone else, is responsible for the farm system.[182] He developed the system while he was an executive of the St. Louis Cardinals in the 1920's. In those days, the Cardinals were among the poorer clubs in the National League and usually finished the season in the second division. He used the farm system as a means of building up the Cardinals. The system proved very successful. In those early years, it was a relatively inexpensive way of obtaining and training young talent for the big league arena. Soon the Cardinals produced great teams which won a number of pennants. To keep pace with the competition on the field, other teams began to build up farm systems.

In view of this history, defenders of the practice would argue that the operation of farm systems, from their incipiency, has never tended to suppress competition, but rather to stimulate it, and that in the case of each major league club farm system expansion was necessary to stay in competition with the other clubs in the league. Moreover, none of these vertical integrations has ever resulted in giving any club the power to exclude competition. No single club has ever gained enough of a foothold on the player market to exclude the other fifteen major league teams. On the contrary, the competition among these clubs for player talent has continued to be substantial.[183]

Critics,[184] on the other hand, take the view that a few clubs, such as the New York Yankees and the Los Angeles Dodgers, through their vast farm systems, have been able to control large portions of the player market. These clubs have under their control far more players than they need,[185] and the only reason they keep so many players tied up in their farm systems is to suppress competition. As long as the Yankees or Dodgers have this talent under contract, they know these players cannot be hitting home runs and making dazzling plays for competing major league clubs. This, it is urged, is unfair both to the players who are deliberately kept from advancing and to the clubs who are blocked from

181 United States v. Paramount Pictures, Inc., 334 U.S. 131, 173-74 (1948); United States v. Columbia Steel Co., 334 U.S. 495, 524-25 (1948). Mr. Justice Douglas wrote the Paramount opinion. Compare his dissent in Columbia Steel at 537-39. See Bork, supra note 180, at 185-94.

182 See Baseball Hearings, 987-95.

183 See note 161 supra.

184 See, e.g., Comment, 62 Yale L.J. 576, 625 (1953).

185 For a break-down of the number of players under control by each major league team see Hearings on Team Sports, pt. 2, at 1901-3.

using their services.[186] Consequently, those opposed to the farm system would conclude that, since it is being used as a method to suppress competition, rather than as a means of permitting clubs to expand to meet legitimate business needs, it should be banned.

No discussion of baseball's practices would be complete without giving some consideration to the opinions of players concerning the reserve clause. As they have had to live with this practice, certainly considerable weight should be accorded their views with respect to the fairness of, as well as the need for, the reserve clause. Both active and former players testified before the House Antitrust Subcommittee in 1951 and in 1957. The overwhelming consensus of their opinions was that the reserve clause was absolutely essential to baseball and that, on the whole, they did not consider this practice to be unfair to players.[187]

Hockey

Organized professional hockey consists of the National Hockey League, hockey's major league, and three minor leagues of equal status.[188] Their operations cover the United States and Canada. Each league is governed by its own constitution and by-laws, while all the leagues are welded together by a joint affiliation agreement.[189] Unlike baseball, teams in the National Hockey League have surprisingly little control over the teams in the three minor leagues. Major league members control only three teams in the minors.[190]

Both the major league and minor league teams in professional hockey gain most of their player control through a series of agreements with teams in the Canadian Amateur Hockey Association and the Amateur Hockey Association of the United States. The term "amateur" as used here is deceiving. In hockey, anyone who does not play with one of the four professional leagues is considered an amateur. Thus, in the upper levels of competition under amateur jurisdiction the players are in fact paid regularly and in some instances quite substantially.

Professional teams have a wide variety of arrangements with amateur clubs concerning players. In addition, each professional team is permitted to sponsor two amateur clubs under mutually agreeable ar-

186 Compare text supra note 125.

187 See Baseball Hearings, 11-19; 589-90; 847-48; 852; 859. See also Hearings on Team Sports, pt. 1, at 1233-47; pt. 2, at 1305-09; 1380-83. Some players did, however, suggest certain improvements in the safeguards on the reserve clause. The most important suggestion was that the draft and option rules be changed to reduce the number of years a player has to spend in the minors. This suggestion has been adopted by baseball. See note 126 supra.

188 The three minor leagues include the American Hockey League, the Western Hockey League and the Quebec Hockey League, Inc.

189 Reprinted in Hearings on Team Sports, pt. 3, at 3112-22.

190 Id. at 2984-85.

rangements. These sponsorships vary from very modest arrangements to full scale operation and control. Approximately 95 per cent of the players who find their way into organized professional hockey are products of the sponsorship system.[191]

The National Hockey League, of course, is the most important league in professional hockey. It is administered primarily by a President and Board of Governors. Each member of the league selects a person to represent it on the Board. The Governors in turn select a President.

The President of the National Hockey League is usually looked upon as the chief spokesman for organized hockey. Although his advice is often sought by the other professional leagues, and although he gives the initial interpretation on joint affiliation agreement problems, he has no control whatever over minor league matters.[192] In this regard, hockey differs from baseball. It has no true counterpart to the Commissioner of Baseball.

Although all professional team sports are modeled after baseball, their oldest and most successful peer, none parallel baseball's operations more closely than hockey. Its practices are almost identical to those of baseball. Consequently, hockey today has as part of its modus operandi the reserve clause practice with its various attendant safeguards,[193] territorial rights,[194] and the farm system. For all practical purposes, the arguments advanced for and against baseball's practices apply equally to hockey,[195] including the recognition by hockey players of the need for the reserve clause.[196]

Football

Organized professional football in the United States is synonymous with the National Football League. This league is composed of 12 teams divided into two conferences, the so-called Eastern and Western Conferences. It is governed by the constitution and by-laws of the National

191 Id. at 2981.

192 Id. at 2994.

193 There are a few minor differences between baseball's and hockey's reserve clause practice. Hockey has no minimum salary requirement. In case of player salary disputes, the President of the National Hockey League arbitrates the matter. Hearings on Team Sports, pt. 3, at 2982. The draft though having the same purpose and effect as baseball's differs in its operation. Id. at 2983-84.

194 There are no restrictions on radio and television rights. Each team contracts with broadcasting companies individually. Hence there is no antitrust problem in this area at the moment.

195 The one argument that would have no application would be the one advanced by organized baseball that many minor league teams are community endeavors which are losing propositions, financially, and without the reserve clause to give these teams some sort of personnel continuity the public spirited citizens owning such teams would no longer try to maintain them.

196 See, e.g., Hearings on Team Sports, pt. 3, at 3005.

Football League.[197] The principal administrator of the rules and regulations set forth therein is the Commissioner of Football who is elected by the club owners. He is assisted in the management of league affairs by the Executive Committee which consists of one representative from each member club.

The reserve clause in football operates on the same general principle as the one in baseball.[198] However, this practice in football differs from that in baseball in two important particulars. First, in football, the clause is buttressed by the "player selection system" or "draft." Second, it is not perpetual, but is limited to a single option to renew. In short, each contract signed by a player is for two years, instead of for his entire playing lifetime.

Each year all football players graduating from American colleges become subject to the draft. At an annual selection meeting, the National League team which finished the previous season in last place is given first choice of the players. In reverse order to the standing of the clubs at the end of the preceding season, each club chooses one player per round. The rounds continue in the same order until all clubs have selected 30 players each. If a college player wants to play in the National Football League, he must play for the team which drafts him, unless the drafting club agrees to assign him to another club.

As in the case of baseball, football has placed certain safeguards on the operation of the reserve clause. In addition to the two year limitation mentioned it has a waiver rule similar in principle to the one in baseball,[199] and a player limit rule.[200] There is no minimum salary requirement[201] or provision for salary arbitration. As football does not have any minor league, there is no need for a "draft" provision similar to the one in baseball.

The arguments advanced, both pro and con, with regard to baseball's reserve clause apply for the most part to football. However, the two year limitation and player selection system provide the basis for some deviation.

Football claims that its reserve clause is the best in sports today.[202] The contention is that the National Football League contract gives the player tremendous bargaining power since he is in the position to peddle his services elsewhere at the end of two years if his club fails to meet his

197 Reprinted in Hearings on Team Sports, pt. 2, at 2580a.
198 See National Football League Standard Players Contract, clauses 4, 10, 11. Contract is reprinted in Hearings on Team Sports, pt. 3, at 2748-50.
199 National Football League Constitution, Art. XV.
200 Id. at Art. XIV.
201 See Hearings on Team Sports, pt. 3, at 2511-12.
202 Id. at 2728.

terms. Not only can such a player offer his services to American teams but also to Canadian clubs which compete with the NFL for American talent. In view of the attributes of this clause, football takes the position that it is reasonable and should not be struck down by the antitrust laws.

With respect to the player selection system, the sentiments of professional football have been voiced by Commissioner Bell.[203] He stated that prior to the adoption of the draft a few wealthy teams, known as the "Big Four"—the Chicago Bears, Green Bay Packers, Washington Redskins and New York Giants, controlled the best players in the league, and won almost all the championships. Between 1933 and 1945, the Big Four won 252 games and lost only 59 against other teams in the league. According to the Commissioner, the lack of athletic competition between the Big Four and the lesser lights in the league caused these richer clubs to prosper and the rest of the league to suffer. Finally, the player draft was adopted. Since that time, the story in the league has been different. Between 1945 and 1956, the same Big Four won only 133 and lost 136 games against those same teams. Commissioner Bell said that the difference in competition was due to the draft system. He further pointed out that the increased attendance at professional football games making possible higher salaries for players is due in great measure to the player selection system. In the light of these circumstances, football claims that this practice is certainly not an unreasonable restraint upon trade or commerce since it has fostered competition rather than stifled it.

There are a number of arguments, however, which may be assembled in opposition to the two-year reserve clause and the player selection system. It has been asserted that the competitive benefit claimed for the two-year reserve clause is a mirage.[204] If, after two years, a star player wanted to sell his services to another club, it is said, that as a practical matter, he would be unable to do so. The contention is that although other clubs might be tempted to sign the star at a higher salary, they would instead respect the perpetual right of his past owner in order that the same treatment would be accorded them if the situation were reversed. Thus, the player's services would be unmarketable for the reason that all clubs would recognize that any attempt to raid another club's players would raise salaries and thereby defeat the very purpose of the reserve clause. Evidently, no player has ever voluntarily, at the end of the two year period, joined another club. This, it is claimed, lends support to the argument that the two-year reserve clause is a mirage.[205]

203 Id. at 2725-28.
204 Id. at 2668.
205 Ibid.

The player selection system, moreover, completely eliminates competition among the clubs for new players. The clubs, in effect, have divided up the players' market so that each club has absolute control over the price it will pay "rookies." Since the purpose and effect of this arrangement is to fix the price of players' services, it may be advocated that such an arrangement should be held illegal per se as a price-fixing device.[206]

Furthermore, the argument on "peonage" advanced by Judge Frank in the *Gardella* case would once again seem to be appropriate.[207] If a player wants to participate in organized professional football in the United States, he must, for all practical purposes, join the club which drafts him. Hence, it may be contended that such dictation over a person's freedom to select his employer is contrary to public policy.

The territorial rights question in football, as it relates to the geographical division of markets among clubs, is the same as in baseball. However, football has no radio and television problem at the moment. This dilemma was settled in *United States v. National Football League,* apparently to the satisfaction of the parties concerned.[208]

Professional football teams have no farm systems. Their players, by and large, receive their apprenticeship in the colleges and universities throughout the country. Nonetheless, it is interesting to note in passing that the National Football League Constitution provides for working agreements, one of the means of building farm systems.[209]

The House Antitrust Subcommittee in its 1957 Hearings, sought the views of players on the reserve clause and the player selection system. Practically all of these witnesses endorsed football's need for such practices.[210]

Basketball

At present organized professional basketball consists of one league, the National Basketball Association.[211] It has an eastern and western division of four teams each, and its operations are confined to the United States. The activities of the NBA, as this league is popularly called, are governed by its constitution and by-laws.[212]

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206 Cf. p. 592 and n.156.

207 See note 154 supra.

208 See statement of Ass't Att'y. Gen. Hansen, Hearings on Team Sports, pt. 1, at 40; National Football League Constitution, Art. X, particularly § 3(b).

209 Art. I, § 19.

210 See Hearings on Team Sports, pt. 3, at 2582-2624, 2679. Norman Van Brocklin did not think the draft was essential. Id. at 2677. George Ratterman did not feel strongly one way or the other with regard to these practices. Id. at 2680.

211 At one time there were two leagues, the Basketball Association of America and the National Basketball League. In 1949, they merged to form the National Basketball Association. Hearings on Team Sports, pt. 3, at 2905.

212 Id. at 2937-63 (copy of constitution and by-laws of the National Basketball Association).

The President of the National Basketball Association, Board of Governors, and Executive Committee, are primarily responsible for administering the affairs of the league. The Board of Governors consists of a representative from each club. Among other things, the Board selects the President and members of the Executive Committee. The President's powers and functions are similar to those possessed by the executive heads of other team sports.[213] The Executive Committee is sort of a "catch all" committee. It has the power to decide all matters not specifically vested by the constitution and by-laws in the President or Board.[214]

The practices of basketball which have antitrust implications, though similar to other team sports, most closely resemble those of football. Basketball, like football, has no farm system, and depends on the player selection system for recruiting its players from college campuses.[215] Excluding the broadcasting aspects, its territorial rights problem is the same as that of any team sport. Basketball's reserve clause is of the "perpetual option" variety, like baseball and hockey, rather than of the "limited option" type employed by football.[216]

The arguments for and against football's player selection system apply with equal force to basketball. The pros and cons discussed with respect to baseball's reserve clause and territorial rights practices, other than the radio and television problem, apply generally to basketball.[217] Also, players testified at congressional hearings that the draft and reserve clause were essential to basketball.[218]

With regard to broadcasting, basketball may have a problem brewing. Individual teams in the NBA do not negotiate their own contracts with television networks.[219] The Association acts in concert on these matters. Each television network agreement is negotiated by the President of the National Basketball Association. However, he does not sigu it. The contract is submitted to the Board of Governors who either accept or reject the deal. The Association has been deliberately trying to equalize the number of exposures each club has on network television. Exactly

213 See id. at 2943.
214 Id. at 2945.
215 There is one minor difference between the basketball and football draft systems. In basketball, if a college player graduates in the territory of a franchise holder, then that club gets first choice on that player's services. For a description of how the basketball draft works see Hearings on Team Sports, pt. 3, at 2906.
216 The safeguards on basketball's reserve clause include the waiver and player limit rule. However, there is no minimum salary requirement or provision for salary arbitration. Moreover, as basketball has no farm system, it has no "draft" similar to baseball and hockey.
217 See note 195 supra.
218 See Hearings on Team Sports, pt. 3, at 2897-99, 2904.
219 This paragraph is based on testimony which appears at pp. 2882-84 of pt. 3 of the Hearings on Team Sports.

how much pressure the NBA uses in getting a television network to broadcast one game instead of another is not known. If the networks do not particularly care which games are telecast, that is one thing, but if the Association demands that the networks take the games it specifies or none at all, that may be held an unreasonable restraint upon "trade or commerce" in violation of the Sherman Act.[220]

Conclusions

The organization and practices of professional team sports are fundamentally the same. To be sure there are some differences. For instance, the player selection system is peculiar to football and basketball, whereas the farm system is found only in baseball and hockey. These differences are not important enough, however to justify separate legislative treatment of each of these sports or of any one of them. Certainly whatever antitrust laws govern one should apply to the others. Thus, no sound basis exists for the current distinction between baseball and other professional team sports.

With regard to the antitrust aspects of practices involved in these sports, there are strong arguments for contending they violate the Sherman Act, while, at the same time there are substantial reasons for asserting they do not. There are two exceptions to this statement. Both concern the reserve clause system.

First, it is highly improbable that courts would decide that the reserve clause is outside the jurisdiction of the Sherman Act. The argument that restraints upon players' services cannot amount to "restraints of trade" within the meaning of the antitrust laws is unsound and should fall. In addition to the reasons discussed earlier,[221] the Supreme Court as far back as 1926, in the case of *Anderson v. Shipowners Association,*[222] declared that restraints involving employment services may come within the Sherman Act.[223] Similarly, the jurisdictional argument that the Norris-LaGuardia Act and section 20 of the Clayton Act permit baseball to blacklist players with impunity under the Sherman Act should fail. The Norris-LaGuardia and Clayton Acts were designed to permit self-help in labor disputes growing out of collective bargaining situa-

220 See p. 594 supra.
221 See p. 590 supra.
222 272 U.S. 359 (1926).
223 In the Anderson case the Supreme Court held that a combination of shipowners and operators who refused to deal with seamen except on the terms and conditions set by the combination was illegal under section 1 of the Sherman Act. The Court in 272 U.S. at 363 stated that the Sherman Act prohibits combinations which would unduly interfere with those who wish to engage in trade and commerce. Consequently, assuming organized professional team sports to be interstate commerce, the collective effort of clubs in any of these sports to prevent a player from engaging in that sport would seem to be a clear violation of the Sherman Act.

tions without the threat of retribution under the antitrust laws. They were not meant to exempt from those laws a concerted refusal to deal with an employee which is unrelated to the collective bargaining process.[224] Hence, any holding in favor of this jurisdictional argument would be contrary to the purpose and intent of those Acts.

Secondly, although a court may find the reserve clause itself (i.e. the contract as opposed to the sanctions to enforce it) is reasonable under the Sherman Act, it is difficult to imagine how the rule of reason can be stretched to encompass that part of the reserve clause practice which is used as a weapon to destroy outside competition. It is one thing to use the reserve clause to maintain competitive athletic balance in a given league, but it is quite another to attempt to stifle a competing league which attempts to hire players. Unquestionably, any use of the reserve clause practice in that manner would be quashed by the courts.[225] Aside from these two exceptions, it is most difficult indeed to predict with substantial certainty whether the courts will or will not uphold the practices involved in organized team sports as reasonable restraints upon trade or commerce. It is at this point that justifiable prognostication fades into unreliable speculation.

There can be no doubt that professional team sports constitute a unique type of business. Their practices, though strange to the rest of the commercial world, have grown up by trial and error, and in large measure, have been found by experience to be essential to their survival. Yet, the judiciary, through its unfamiliarity in this field and by indiscriminately applying conventional per se concepts, may completely destroy the foundations upon which these sports are built. In order to avoid this possibility, and its consequent detrimental effect on professional team sports as well as the general public, Congress should enact appropriate legislation in this area. Even the Supreme Court has recognized that Congress is better equipped to deal with the problem of professional team sports than the judiciary. Surely this is what the Court had in mind when it stated in the *Radovich* case:[226]

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224 See note 147 supra.

225 To the extent that the reserve clause is used as a war measure to stifle outside competition it would probably be held to violate both sections 1 and 2 of the Sherman Act. The use of boycotts and blacklists in such tactics would violate section 1. See Fashion Originators' Guild of America, Inc. v. Federal Trade Commission, 312 U.S. 457 (1941); Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600 (1914). Moreover, it could probably be successfully argued that each of the existing organized team sports is a monopoly since each one virtually controls the supply in its respective market of selling to the public exhibitions in either professional baseball, football, basketball or hockey. Consequently, the use of power to exclude competition would provide the necessary element for the offense of monopolization under section 2. See Rep. Atty. Gen. Comm. to Study Antitrust Laws 43 (1955).

226 352 U.S. at 452.

Congressional processes are more accommodative, affording the whole industry hearings and an opportunity to assist in the formulation of new legislation. The resulting product is therefore more likely to protect the industry and the public alike.

III. Policy and Congressional Alternatives

It is generally agreed that all professional team sports should be treated alike under the antitrust laws and that Congress should eliminate the present discrimination which exists in favor of baseball. The major question, of course, is how this should be done. Congress has the choice of several approaches to the problem. One would be to grant team sports complete exemption from those laws. Another would be to enact legislation making such sports subject to existing antitrust legislation. A third would be to establish a governmental agency to regulate team sports. Finally, Congress could grant these sports some type of partial exemption.

Legislation based on the first approach—complete immunity—would be absolutely unjustified. A statute of this type would mean that organized team sports could engage in any type of business activity and be completely free from antitrust penalty. Thus, they could place unreasonable restraints on broadcasting rights. They could use all kinds of concerted methods to exclude outside competition, and they would be free to compete unfairly in many other commercial endeavors. The survival of organized team sports does not require such immunity. Even spokesmen for these sports were unable to offer the slightest justification for this kind of carte blanche legislation.[227] Surely such a broad exemption could not be granted without doing considerable injury to the basic policy of competition upon which all antitrust laws are based.[228]

However, to place organized team sports completely under the antitrust laws would also be unwise. Until the *Radovich* case was decided in 1957, it was logical to think that other professional team sports shared baseball's immunity from the antitrust laws. That decision made it clear that other sports were not so fortunate. At the same time, the Supreme Court urged Congress to take legislative action in this field. All those interested in this problem are waiting to see what Congress will do. Consequently, from a practical point of view, it can be said that potential litigants have been hesitant to file suits against any team sport because until 1957 they considered all team sports to be exempt

227 See, e.g., Hearings on Team Sports, pt. 3, at 2995.

228 The objective of all statutes in the field on antitrust is to ensure the nation a competitive economy. This has been stated frequently by the Supreme Court as the basic objective of the antitrust laws. See, e.g., Times-Picayune Pub. Co. v. United States 345 U.S. 594, 605 (1953); Standard Oil Co. v. Federal Trade Commission, 340 U.S. 231, 248-49 (1951); United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 559 (1944).

from the antitrust laws. Now they are waiting to see what course Congress will take before they make their moves.

The enactment of legislation making all team sports subject to the antitrust laws would bring with it a large amount of litigation. Due to the paucity of settled legal principles in this area, these sports would become the targets for disgruntled players and perhaps for the Department of Justice. No matter how these cases were ultimately decided, professional team sports, and indeed, the public, would be adversely affected. Assume that eventually the courts substantially upheld all of the practices employed by these sports as reasonable under the antitrust laws. To reach that point would take years of costly litigation. In the process several clubs would probably be driven into bankruptcy. The net result would be economic instability in professional team sports for a number of years to come with an attendant detrimental effect upon athletic competition, players, sports fans, and the communities in which clubs operate.[229]

Let us examine the probability of bankruptcy more closely since that assumption may seem incredible. Baseball, the titan of professional team sports is but a midget in the world of finance. In 1956 the total gross income from all the sources of organized baseball in the United States was approximately $65 million. This is less than one-half the volume of business done in the same year by a single department store in New York City.[230]

To get more specific, in the period 1952-56 two major league clubs suffered considerable financial losses each year, and five others lost much more than they made over the same five years.[231] Were it not for the fact that most big league teams are backed by a number of independently wealthy men more interested in the "psychic income" of winning teams than financial profits,[232] a number of clubs would have gone bankrupt before now. It is extremely doubtful, however, whether these investors are such sportsmen that they would hang onto teams losing money which are also plagued with the added expense and inconvenience of defending treble damage suits.

As for other team sports, six out of eight clubs in the National Basketball Association had net losses on their operations over the past six years.[233] Two of the six hockey teams in the National Hockey League suffered losses each year during the period 1952-56, and one other lost

229 See Seymour, "Ball, Bat and Bar," 6 Clev.-Mar. L. Rev. 534, 535-36 (1957).
230 Hearings on Team Sports, pt. 1, at 165.
231 Id. at 353.
232 See House Report 91-92.
233 Hearings on Team Sports, pt. 3, at 2928, 2935.

more than it earned for the same five years.[234] In football, one club had losses for each year during that same time span.[235] Obviously then, there are a number of clubs in organized team sports which could be pushed into bankruptcy by protracted antitrust litigation.

Suppose, on the other hand, the courts struck down the practices upon which these teams are dependent. Not only would the litigation involve the financial problems and consequences previously discussed, but such judicial determination would spell the end of professional team sports as they are known today. There would probably be a return to chaotic economic conditions similar to those which existed in baseball prior to the adoption of the reserve clause,[236] and in football before the player selection system was put into effect.[237] Certainly, the restoration of such conditions should be avoided.

The second approach—making all team sports subject to the antitrust laws—is unfeasible and must be rejected. Enactment of such legislation would tend to lessen competition rather than promote it. As a consequence of the litigation which would follow, a number of teams would either be driven into bankruptcy or become so pressed financially that they would be unable to compete efficiently with the richer clubs in the league. Moreover, if certain practices, such as the player selection system and the reserve clause were eliminated by judicial decision, there would be a repetition of the competitive inequities which existed before the adoption of these measures.

The third alternative which suggests a governmental agency for sports must also be discarded. Aside from the intricacies of drafting legislation to set up this agency, the hearings held by Congress in 1951 and again in 1957 produced no evidence to justify the establishment of a government bureau to regulate sports. Without strong proof that the affairs of team sports demand close governmental supervision, it would be improper for Congress to conduct such an experiment at the expense of the American taxpayer.

The best approach is one which would grant a partial exemption to organized professional team sports. In this way, practices considered essen-

234 Id. at 3131-46.

235 Id. at 2566. Although only one team suffered losses each year for the period 1952-56, the profits of the other clubs were not huge. Serious litigation could do great harm to almost any of them. This is reflected in Commissioner Bell's statement before Congress where he said (id. at 2734):

> Very frankly, gentlemen, our league would not be financially able to bear the cost of such litigation. We are very hopeful, therefore, that you will recommend specific or general legislation which will give approval of Congress to our present practices and render it unnecessary for us to have to establish in the courts that they are reasonable practices.

236 See House Report 16-22, 229.

237 Hearings on Team Sports, pt. 3, at 2725-27. Compare id. 2906-07.

tial to the successful survival of these sports could be given immunity from the antitrust laws, while their other business activities would be held subject to those laws. This alternative would permit Congress to side-step the pitfalls of the first two approaches discussed.

Although the "partial exemption" alternative provides the best approach to drafting legislation on the antitrust aspects of professional team sports, the value of any bill using this approach would depend, of course, on the exact nature of the exemption. For example, the House Antitrust Subcommittee adopted this approach in the bill it recently recommended to the Judiciary Committee.[238] Yet there is grave doubt as to whether this bill is satisfactory.

The bill in question would give professional baseball, basketball, football and hockey a partial exemption from the antitrust laws.[239] If enacted, it would presumably exempt reasonable reserve clauses, player drafts, and farm systems from the scope of those laws.[240] The bill also would permit professional team sports to impose reasonable territorial restrictions on teams and to impose such reasonable restraints on television and radio broadcasting as are needed to preserve these territories.[241]

The difficulty with the bill is that its exemptions are not specific enough. For instance, what is a *reasonable* reserve clause? Should it be able to give a club a perpetual option on the playing services of an athlete, or should it be limited to a specific number of years? If the latter, what should be the duration of the limitation—two, four, five or just how many years? As the playing life of a professional baseball player is much longer than that of a professional football player, should a baseball club be able to hold a player under reservation longer than a football team? If so, how much longer?

Moreover, exactly what safeguards should surround a reasonable reserve clause? Should there be a minimum salary requirement? If so, what should the amount be? Is a requirement for the arbitration of salary disputes necessary? Should these safeguards be the same for each organized professional team sport?

The foregoing are but a few of the questions which would have to be answered to determine what reserve clauses would be reasonable. Many more such questions could be raised not only with respect to reserve clause practices, but also with regard to what would constitute reasonable

238 See note 84 supra.
239 See p. 579 supra.
240 Press release by Rep. Emanuel Celler, Chairman of the House Judiciary Committee and its Antitrust Subcommittee, dated January 30, 1958, explaining H.R. 10378, 85th Cong., 2d. Sess. (1958).
241 Ibid.

player drafts, farm systems, and territorial rights practices, including restrictions upon broadcasting. Obviously then, if the bill reported out by the House Antitrust Subcommittee should be passed, it would require a vast amount of litigation to decide what practices are reasonable. Since reference has already been made to the deleterious consequences which would probably flow from a large amount of litigation in this field, nothing more need be said about it here.[242] Additional reasons will be given for congressional rejection of this bill.

By enacting this legislation, Congress, in a subtle way, would be passing back to the judiciary the problem of the extent to which professional team sports should be exempt from the antitrust laws. This should not be done. As Congress has held extensive hearings on this subject, it should be in a better position than the courts to decide what exemptions should be granted these sports. In fact, it is most difficult to imagine the circumstances under which a court would ever have before it the multitude of witnesses—the Commissioners of Baseball and Football, the Presidents of the National Hockey League and the NBA, club owners, players, sports authorities, and so on—necessary for it to gain the comprehensive understanding of professional team sports so essential for deciding intelligently which practices of this unique industry should be exempt from antitrust laws.

Finally, Congress should try to make exemptions from laws as specific as possible in order to avoid placing unnecessary burdens on the already overloaded federal courts. The bill approved by the House Antitrust Subcommittee fails to do this. Its language extends an invitation to litigation.

IV. A Legislative Proposal

Organized professional team sports should be placed under the antitrust laws and simultaneously be given several specific exemptions.[243] These should include, either wholly or in part, the following practices: the reserve clause, player selection system, and territorial rights including certain aspects of broadcasting. In addition, provision should be made for certain safeguards to protect players and to promote free competition. The ensuing discussion will consider, among other things, the extent to which immunity should be granted each practice mentioned,

242 See the discussion above on the second alternative which would place team sports under the antitrust laws.

243 The language of the bill would state that the Sherman Act, 26 Stat. 209 (1890), 15 U.S.C. §§ 1-7 (1952); the Clayton Act, 36 Stat. 730 (1914), 15 U.S.C. §§ 12-27 (1952); the Federal Trade Commission Act, 38 Stat. 717 (1914), 15 U.S.C. §§ 41-77 (1952); and the Robinson-Patman Antidiscrimination Act 49 Stat. 1526 (1936), 15 U.S.C. §§ 13, 13a, 13b, 21a (1952) apply to the organized professional team sports of baseball, basketball, football and hockey. Thereafter, specific exemptions would be granted.

what safeguards should be adopted, and why the farm system should not be allowed exemption.

There is no doubt that the reserve clause gives clubs in an organization[244] continuity in player personnel, and prevents the clubs from entering into a mad scramble for each other's players. Both of these are necessary to maintain some semblance of competitive balance in an organization of a single league or a group of leagues. However, as stated earlier, the use of the reserve clause system as a war club against outside competitors should be taboo.

With these principles in mind, then, if a player continues to play in one organization, such as the National Basketball Association, the club which originally sigus that player should be able to have a continual option to renew that player's contract for each season that the player participates in the NBA, unless the team chooses to assign him to another club in the league.[245] However, if the player, at the end of a season, decides that the next season he wants to play in another basketball leagne, he should be able to do so without being blacklisted by the NBA and without the NBA being able to use any other type of coercive economic method against either the player or the outside league.

Moreover, it is realized that by placing its approval on the reserve clause, Congress would have to take special care to see that players are protected. In addition to making it possible for players to join outside organizations without fear of economic reprisal, other safegnards would have to be employed. One of the problems with the reserve clause from the viewpoint of player-management relations is that the club owner has the upper hand in salary negotiations. This situation should be equalized by requiring salary disputes to be arbitrated. If a player and club owner should disagree, each should be able to select an arbitrator to determine the matter. Should the two arbitrators be unable to resolve the question, they should be empowered to select a third arbitrator. If they cannot agree on a third arbitrator, the selection should be made by the Director of the Federal Mediation and Conciliation Service. The decision of a majority of the arbitrators, of course, would be final and binding on both parties.

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244 The term "organization" as used herein means that teams or clubs engaged in professional baseball, basketball, hockey, or football are combined or otherwise affiliated in the form of a league or an association of leagues. The NBA, for example, is an organization consisting of a single league. The government of organized professional baseball, on the other hand, is an organization consisting of many leagues.

245 It has been suggested that reserve clauses be limited to a certain number of years. Some say it should be limited to two years; others claim five years is the right number; and so on. I rejected the limited reserve clause idea as being bighly impractical on the basis of statements made by a number of experts during the course of the 1957 Congressional hearings. See, e.g., Hearings on Team Sports, pt. 1, at 104-08, 113; pt. 2, at 1306; pt. 3, at 2668, 2910.

Attempts to organize labor unions, as such, in team sports have met with nothing but failure.[246] Perhaps the reason for this is because the players, themselves, do not want to have their salaries determined by collective bargaining. Surely there are so many variations and gradations of skill among professional athletes that their salary negotiations do not lend themselves to collective bargaining. Be that as it may, organized baseball, basketball, football, and hockey, each have a players' association. Naturally, these associations are not typical labor unions, but they do try to secure concessions from owners in which all players have a common interest, such as pension plans, minimum salaries, extra payment for exhibition games, and so on. Any legislation exempting the reserve clause from the antitrust laws should make it clear that these associations, if they so desire, may use collective bargaining or related techniques to accomplish their objectives.

Exemption should also be granted to the player selection system. There is no question that this practice has helped a great deal to equalize athletic and business competition in football and basketball. It has been beneficial to players, owners, and the sports public alike. However, exemption should be so worded that the player selection system could not become the means of punishing players for joining outside organizations, or become a method of excluding outside competition.

Territorial rights, as they relate to the division of geographical areas among clubs in organized team sports, should also be allowed exemption. But an organization should not be permitted to use economic sanctions against a competing organization if the latter should move a club into the same territory.

With respect to the broadcasting aspects of territorial rights, the big problem today is television. The path pioneered by Judge Grim in *United States v. National Football League* provides an equitable solution to this question. Any professional team sport organization should be allowed to prohibit telecasts into the home territory of one of its affiliated clubs whenever that team is playing at home. This should give baseball tremendous help with its minor league dilemma and at the same time not unduly injure the public interest. The allowance of any restrictions upon radio broadcasting, however, would be completely unjustified.

The farm system, though significant in the operation of baseball and hockey, can hardly be considered essential to their successful survival. That practice does not fall into the same category as the reserve clause, player selection system, and territorial rights. Commissioner Frick, in

[246] See House Report 172-77.

his statement before the House Antitrust Subcommittee, said that territorial rights along with the reserve clause were the "keystones" of organized baseball.[247] He made no such claim in behalf of the farm system. Moreover, there was substantial evidence produced in the hearings in 1951 and again in 1957 against the use of the farm system.[248] This is not to say that the farm system should be held in violation of the antitrust laws. On the contrary, there are a number of favorable arguments to support this practice; and, if ever tested by suit, it may well be upheld. However, "exemptions from antitrust should not be lightly profferred,"[249] and it has not been shown that this practice is such a vital part of professional team sports as to justify its exclusion from the antitrust laws.[250]

The proposed legislation should not apply retroactively. This would prevent any litigation under the act based on past conduct. Thus, baseball would not be held accountable for the acts it committed during the period of its immunity from the antitrust laws. Furthermore, it would avoid a possible constitutional law problem. This legislation would amend the Sherman Act, a criminal statute. If it were retroactive, it might be argued that the act was an ex post facto law in violation of Article 1, Section 9 of the Constitution.[251]

In summary, then, the proposed legislation would:[252]

1. Declare the antitrust laws to be applicable to the organized professional team sports of baseball, basketball, football and hockey, except as otherwise provided.[253]
2. Provide that the antitrust laws would not apply to uniform player contracts, which, in effect, allow a club to have a continual, annual option to renew its contract with a player as long as he plays in the organization of which that club is a member. However, in order for an organization to be entitled to this exemption, it would have to:
   A. Provide in its uniform player contract that if any club and player should disagree on salary, that matter would be submitted to arbitration. The player and club would each be entitled to select one arbitrator. If the arbitrators were unable to resolve the dispute, they would be entitled to select a third arbitrator. If they were not able to agree on the third arbitrator, the selection would be made by the Director of the Federal Mediation and Conciliation Service.

247 Hearings on Team Sports, pt. 1, at 168.

248 See, e.g., House Report 179-80, 183, 184, 186-88; Hearings on Team Sports, pt. 2, at 1838-39, 1844.

249 Hearings on Team Sports, pt. 1, at 40.

250 Furthermore, as any antitrust litigation based primarily on the farm system practice would probably be aimed at the richer clubs, it could hardly be argued that such litigation would drive weaker clubs into bankruptcy. Therefore, the bankruptcy argument discussed earlier is of no significance as far as the farm system practice is concerned.

251 See Hearings on Team Sports, pt. 1, at 79.

252 This is not written in the form of a bill. It is a summary of those points which I think a bill on this subject should contain.

253 See note 243 supra.

Any decision by a majority of the arbitrators would be binding on the parties.

B. Provide in its uniform player contract that at the end of any season a player would be released from his contract if he joined a club outside the organization of which the signatory club was a member.
C. Expunge from its rules and regulations those provisions under which it might declare ineligible or otherwise suspend (blacklist) a player, who after playing out the season, joined a competing organization.
D. Remove from its rules and regulations any provisions which might permit it to employ economic sanctions against an outside competitor.
E. Refrain from blacklisting or using any other economic sanctions whatsoever against a player, who after playing out any season, joined the club of an outside organization the following season.
F. Refrain from boycotting or using any other economic sanctions against outside competitors.

3. Provide that the antitrust laws would not apply to the player selection system. However, that system could not be used in any way as a device by one organization to prevent a player from joining an outside organization if he should choose to do so. Nor could any organization employ any sanctions whatsoever against a player who should join an outside organization, or against that outside organization itself.
4. Provide that antitrust laws would not apply to agreements between leagues and between clubs relating to the rights of the parties to such agreements to operate within specific geographical areas (territorial rights). This provision would have no application to radio or television rights. Moreover, the territorial rights practice could not be used in any way to restrict an outside organization from moving a club into the same territory.
5. Provide that any organized team sport could prohibit telecasts into the home territory of any affiliated club on the day that the club is playing at home. However, the organization could exercise no restrictions over radio broadcasting rights.
6. Declare that nothing in the act should be construed to deprive any players in any sport subject to the act of any right to bargain collectively or to engage in other concerted activities for their mutual aid or protection.
7. State that the act should not apply retroactively. Also at least a 90 day period after the act has become effective should be granted to professional team sports so that they can make the necessary changes in their practices to comply with the act.

V. Conclusions

In *Radovich v. National Football League* the Supreme Court declared that the protective umbrella of the *Federal Baseball* and *Toolson* cases extended only to baseball. The Court, recognizing the close similarity between baseball and other professional team sports, realized that its decision might be considered "inconsistent or illogical,"[254] but contended

[254] 352 U.S. at 452.

that any error or discrimination resulting from its strict application of stare decisis should be eliminated by legislation and not by court decision. Thus, the Supreme Court passed to Congress the problem of determining to what extent, if any, professional team sports should be exempt from the antitrust laws.

An analysis of this perplexing question has been undertaken in this paper. On the basis of this study, a proposed solution has been offered to the problem currently facing Congress. It is believed that this proposal would give professional team sports the protection they need without damaging the public interest. Indeed, it is designed "to protect the industry and the public alike."[255]

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255 Ibid.